No. 14-1095

In The
Supreme Court of the United States

MICHAEL MUSACCHIO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

JOINT APPENDIX

DONALD B. VERRILLI, JR.
Solicitor General
(Counsel of Record)
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ROMAN MARTINEZ
Assistant to the Solicitor General
PRAVEEN KRISHNA
Attorney
DEPARTMENT OF JUSTICE
Washington, D.C. 20530
(202) 514-2217
SupremeCtBriefs@usdoj.gov
Attorneys for Respondent

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, NW
Washington, D.C. 20008
(202) 237-8165
jaffe@esjpc.com

JOE KENDALL
JODY RUDMAN
THE KENDALL LAW GROUP
3232 McKinney Avenue
Dallas, TX 75204
(214) 744-3000
jkendall@kendalllawgroup.com
Attorneys for Petitioner

Petition for Writ of Certiorari Filed Mar. 9, 2015
Certiorari Granted June 29, 2015

TABLE OF CONTENTS

Table of Contents i

District Court Docket Entries 1

Court of Appeals Docket Entries 26

Original Indictment, Nov. 2, 2010 46

Superseding Indictment, Sept. 6, 2012 [Excerpt] 80

Government's Proposed Jury Instructions, Sept. 7, 2012 [Excerpts] 85

Second Superseding Indictment, Jan. 8, 2013 89

Government's Amended Jury Instructions, Feb. 1, 2013 [Excerpts] 115

Government's Second Amended Jury Instructions, Feb. 26, 2013 [Excerpts] 120

Transcript Vol. 1, Feb. 19, 2013 [Excerpts] 125

Transcript Vol. 3, Feb. 21, 2013 [Excerpts] 136

Transcript Vol. 7, Feb. 27, 2013 [Excerpts] 141

Transcript Vol. 8, Feb. 28 & Mar. 1, 2013 [Excerpts] 144

Jury Charge and Completed Verdict Form, Mar. 1, 2013 157

Sentencing Transcript Part 2, Sept. 5, 2013 [Excerpts] 180

The following opinions and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

Fifth Circuit Opinion, Nov. 10, 2014 .....A1-A16

District Court for the Northern District of Texas Judgment, Nov. 19, 2013.....B1-B12

Fifth Circuit denial of rehearing *en banc*, Dec. 9, 2014 .....C1-C2

District Court for the Northern District of Texas, Sentencing Transcript Excerpt, July 3, 2013 ..... D1-D2

DISTRICT COURT DOCKET ENTRIES

U.S. District Court
Northern District of Texas (Dallas)
CRIMINAL DOCKET FOR CASE #:
3:10-cr-00308-P All Defendants

Case title: USA v. Musacchio et al

Date Filed: 11/02/2010
Date Terminated: 11/19/2013

Assigned to: Judge Jorge A Solis

Appeals court case number: 13-11294

* * * * *

Date Filed	#	Docket Text
		* * *
11/02/2010	1	INDICTMENT as to Michael Musacchio (1) count(s) 1, 23-24. Joseph Taylor (Roy) Brown (2) count(s) 1, 2-22, John Michael Kelly (3) count(s) 1, 2-22. (ykp) (Entered: 11/03/2010)
		* * *
11/04/2010	6	Minute Entry for proceedings held before Magistrate Judge Renee Harris Toliver: Arraignment as to Michael Musacchio (1) Count 1,23-24 held on 11/4/2010. Plea entered by Michael

Musacchio: Not Guilty on counts 1,23,24. Attorney Appearances: AUSA Linda Groves; Defense - Jay Ethington. (Court Reporter: Digital File) (No exhibits) Time in Court :01. (mcr) (Entered: 11/05/2010)

* * *

11/04/2010 10 Minute Entry for proceedings held before Magistrate Judge Renee Harris Toliver: Arraignment as to Joseph Taylor (Roy) Brown (2) Count 1,2-22 held on 11/4/2010. Plea entered by Joseph Taylor (Roy) Brown: Not Guilty on counts 1,2-22. Attorney Appearances: AUSA - Linda Groves; Defense David Finn. (Court Reporter: Digital File) (No exhibits) Time in Court :01. (mcr) (Entered: 11/05/2010)

* * *

11/05/2010 15 Minute Entry for proceedings held before Magistrate Judge Renee Harris Toliver: Arraignment as to John Michael Kelly (3) Count 1,2-22 held on 11/5/2010. Plea entered by John Michael Kelly: Not Guilty on counts 1,2-22. Attorney Appearances: AUSA - Paul Yanowitch; Defense John Nicholson. (Court Reporter: Digital File) (No exhibits) Time in Court :01. (mfw) (Entered: 11/08/2010)

* * *

11/17/2010	25	Unopposed MOTION for Designation as Complex Case and for Continuance filed by USA as to Michael Musacchio, Joseph Taylor (Roy) Brown, John Michael Kelly (Groves-DOJ, Linda) Modified on 11/18/2010 (skt). (Entered: 11/17/2010)
11/19/2010	26	ORDER granting 25 Unopposed Motion for Designation as Complex Case and for Continuance as to Michael Musacchio (1), Joseph Taylor (Roy) Brown (2), John Michael Kelly (3). Jury Trial continued to 7/18/2011 08:45 AM before Judge Jorge A Solis. Motions due by 6/8/2011. Pretrial Materials due by 7/1/2011. Responses due by 6/20/2011. Pretrial Conference set for 7/6/2011 03:00 PM before Judge Jorge A Solis. (see order) (Ordered by Judge Jorge A Solis on 11/19/2010) (axm) (Entered: 11/19/2010)
12/20/2010	27	Unopposed MOTION to Amend/Correct 1 Indictment filed by USA as to Michael Musacchio, Joseph Taylor (Roy) Brown, John Michael Kelly (Attachments: # 1 Proposed Amendment Amended Indictment) (Groves-DOJ, Linda) (Entered: 12/20/2010)
12/21/2010	28	ORDER granting 27 Government's Motion Requesting the Court to Permit the Filing of an Amended Indict-

	ment to Correct the Name of Defendant No. 2 to "Joseph Roy Brown" as to Michael Musacchio (1), Joseph Taylor (Roy) Brown (2), John Michael Kelly (3). (See Order) (Ordered by Judge Jorge A Solis on 12/21/2010) (skt) (Entered: 12/21/2010)
04/25/2011	NOTICE OF HEARING as to Joseph Roy Brown: Rearraignment set for 5/18/2011 01:30 PM in US Courthouse, Courtroom 1632, 1100 Commerce St., Dallas, TX 75242-1310 before Judge Jorge A Solis. (chmb) (Entered: 04/25/2011)
05/18/2011	ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Rearraignment Hearing as to Joseph Roy Brown held on 5/18/2011. Plea entered by Joseph Roy Brown (2) Guilty Count 1 Amended Indictment filed 12/21/2010. Defendant continued on Pretrial Release. Attorney Appearances: AUSA - Linda C. Groves; Defense - David Finn. (Court Reporter: Shawn McRoberts) (No exhibits) Time in Court - :15. (chmb) (Entered: 05/18/2011)
	* * *
08/02/2012	ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Rearraignment Hearing as to John Michael Kelly held on 8/2/2012.

		Plea entered by John Michael Kelly (3) Guilty Count 1. Pretrial Release continued. Attorney Appearances: AUSA - Linda Groves; Defense - John Nicholson. (Court Reporter: Shawn McRoberts) (No exhibits) Time in Court - :15. (chmb) (Entered: 08/02/2012)
		* * *
09/06/ 2012	128	SUPERSEDING INDICTMENT as to Michael Musacchio (1) count(s) 1s, 2s-3s. (axm) (Entered: 09/07/2012)
		* * *
09/07/ 2012	131	Proposed Jury Instructions filed by USA as to Michael Musacchio (Groves-DOJ, Linda) (Entered: 09/07/2012)
		* * *
09/07/ 2012	134	Proposed Jury Instructions filed by Michael Musacchio (Ethington, Jay) (Entered: 09/07/2012)
		* * *
01/08/ 2013	145	SECOND SUPERSEDING INDICTMENT as to Michael Musacchio (1) count(s) 1ss, 2ss-3ss. (jrr) (Entered: 01/09/2013)
		* * *
02/01/ 2013	152	Proposed Amended Jury Instructions filed by USA as to Michael Musacchio

(Groves-DOJ, Linda) Modified on 2/4/2013 (jgf). (Entered: 02/01/2013)

* * *

02/01/2013	154	Proposed Additional Jury Instructions filed by Michael Musacchio (Ethington, Jay) Modified on 2/4/2013 (jgf). (Entered: 02/01/2013)

* * *

02/19/2013	161	*** Jury Roll as to Michael Musacchio. (axm) (Entered: 02/19/2013)
02/19/2013		ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Jury Selection held and Jury trial begun on as to Michael Musacchio held on 2/19/2013. Attorney Appearances: AUSA Linda Groves; Richard Green; Candina Heath; Defense Jay Ethington: Reed Manning. (Court Reporter: Shawn McRoberts) (Exhibits admitted - returned to party) Time in Court 5:30. (chmb) (Entered: 02/20/2013)
02/20/2013		ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Second day of Jury Trial as to Michael Musacchio held on 2/20/2013. Attorney Appearances: AUSA Linda Groves; Richard Green; Candina Heath; Defense Jay Ethington: Reed Manning. (Court Reporter: Shawn McRoberts) (Exhibits admitted re-

		turned to party) Time in Court - 6:10. (chmb) (Entered: 02/21/2013)
02/21/ 2013		ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Third day of Jury Trial as to Michael Musacchio held on 2/21/2013. Attorney Appearances: AUSA - Linda Groves: Richard Green; Candina Heath; Defense Jay Ethington: Reed Manning. (Court Reporter: Shawn McRoberts) (Exhibits admitted returned to party) Time in Court 6:45. (chmb) (Entered: 02/22/2013)
02/22/ 2013		ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Fourth day of Jury Trial as to Michael Musacchio held on 2/22/2013. Attorney Appearances: AUSA Linda Groves; Richard Green; Candina Heath; Defense - Jay Ethington: Reed Manning. (Court Reporter: Shawn McRoberts) (Exhibits admitted - returned to party) Time in Court 6:45. (chmb) (Entered: 02/27/2013)
02/24/ 2013	162	Defendant's Second Amended Proposed Jury Instructions filed by Michael Musacchio (Ethington, Jay) (Entered: 02/24/2013)
02/25/ 2013		ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Fifth day of Jury Trial as to Michael Musacchio held on 2/25/2013.

		Attorney Appearances: AUSA Linda Groves; Richard Green; Candina Heath; Defense Jay Ethington: Reed Manning. (Court Reporter: Shawn McRoberts) (No exhibits) Time in Court - 3:15. (chmb) (Entered: 02/27/2013)
02/26/ 2013	163	Proposed Jury Instructions filed by USA as to Michael Musacchio (Groves-DOJ, Linda) (Entered: 02/26/2013)
02/26/ 2013	164	MOTION for Acquittal *Pursuant to Fed. R. Crim. P. 29* filed by Michael Musacchio with Brief/Memorandum in Support. (Ethington, Jay) (Entered: 02/26/2013)
02/26/ 2013		ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Sixth day of Jury Trial as to Michael Musacchio held on 2/26/2013. Attorney Appearances: AUSA Linda Groves; Richard Green; Candina Heath; Defense - Jay Ethington: Reed Manning. (Court Reporter: Shawn McRoberts) (Exhibits admitted returned to party) Time in Court 7:15. (chmb) (Entered: 02/27/2013)
02/27/ 2013		ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Seventh Day of Jury Trial as to Michael Musacchio held on 2/27/2013. Jury Charge Conference held 5:15 p.m to 5:45 p.m. Attorney Appearances:

		AUSA - Linda Groves; Richard Green; Candina Heath; Defense Jay Ethington: Reed Manning. (Court Reporter: Shawn McRoberts) (Exhibits admitted returned to party) Time in Court - 6:30. (chmb) (Entered: 02/28/2013)
		* * *
02/28/2013		ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Eighth Day of Jury Trial as to Michael Musacchio held on 2/28/2013. Evidence concluded. Closing Arguments and Jury Charge. Case submitted to the jury for deliberation. Attorney Appearances: AUSA - Linda Groves, Richard Green, Candina Heath; Defense Jay Ethington, Reed Manning. (Court Reporter: Shawn McRoberts) (Exhibits admitted returned to party) Time in Court 4:45. (chmb) (Entered: 03/01/2013)
02/28/2013	167	Certification of Trial Exhibits for Jury Deliberations filed by USA and Michael Musacchio as to Michael Musacchio. (Ordered by Judge Jorge A Solis on 2/28/2013) (chmb) (Entered: 03/04/2013)
03/01/2013		ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Ninth Day of Jury Trial as to Michael Musacchio held on 3/1/2013.

		Jury continued deliberations. Jury Verdict Rendered Guilty on Counts 1, 2 and 3. Defendant continued on Pretrial Release. Attorney Appearances: AUSA Linda Groves, Richard Green, Candina Heath; Defense Jay Ethington, Reed Manning. (Court Reporter: Shawn McRoberts) (No exhibits) Time in Court 5:00. (chmb) (Entered: 03/04/2013)
03/01/ 2013	166	Jury Charge and Verdict Form as to Michael Musacchio. Jury Charge Signed by Judge Jorge A Solis on 2/28/2013. (chmb) (Entered: 03/04/2013)
03/01/ 2013	168	ORDER as to Michael Musacchio releasing all trial exhibits to counsel for the parties. (Ordered by Judge Jorge A Solis on 3/1/2013) (chmb) (Entered: 03/04/2013)
		* * *
03/15/ 2013	170	MOTION New Trial filed by Michael Musacchio (Attachments: # 1 Exhibit(s) Exhibit A, # 2 Exhibit(s) Exhibit B) (Ethington, Jay) (Entered: 03/15/2013)
		* * *
03/25/ 2013	173	RESPONSE by USA as to Michael Musacchio re: 170 MOTION New Trial (Groves-DOJ, Linda) (Entered: 03/25/2013)

* * *

08/29/2013	199	Supplemental MOTION for Judgment of Acquittal Pursuant to Federal Rule of Criminal Procedure 29 filed by Michael Musacchio. (Ethington, Jay) Modified on 8/30/2013 (skt). (Entered: 08/29/2013)
08/29/2013	200	Courtesy copy of correspondence re Sentencing Hearing Response as to Michael Musacchio (Attachments: # 1 Additional Page(s) Attachment, # 2 Additional Page(s) Attachment) (Ethington, Jay) Modified on 8/30/2013 (skt). (Entered: 08/29/2013)
08/30/2013	201	NOTICE *Letter to Court* as to Michael Musacchio (Ethington, Jay) (Entered: 08/30/2013)
08/30/2013	203	RESPONSE AND OBJECTION by USA as to Michael Musacchio re: 199 Supplemental MOTION for Judgment of Acquittal Pursuant to Federal Rule of Criminal Procedure 29 (Groves-DOJ, Linda) (Entered: 08/30/2013)

* * *

09/05/2013	206	ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Sentencing held on 9/5/2013 for Michael Musacchio (1) BOP for a term of Sixty (60) Months as to Counts 1 and 2 to run concurrent; Three (3)

Months as to Count 3 to run consecutive to Counts 1 and 2 for a total of Sixty-three (63) Months; Supervised Release for Three (3) years as to each Count to run concurrent for a total of Three (3) years. Restitution to be determined; MSA $100 per count for a total of $300.00. Defendant continued on Pretrial Release Voluntary Surrender date to be determined. Remaining issue of restitution to be briefed by counsel, briefs due 10/4/2013. Attorney Appearances: AUSA Linda Groves, Candina Heath; Defense Jay Ethington, Reed Manning: Camille Knight. (Court Reporter: Shawn McRoberts) (Exhibits admitted) Time in Court - 4:30. (chmb) Modified on 12/5/2013 to correct the file date (svc). (Entered: 09/06/2013)

09/25/2013	208	ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Sentencing held on 9/25/2013 for Joseph Roy Brown (2), Count 1, BOP for a term of Twelve (12) Months and One (1) day; Supervised Release Two (2) years; Restitution to be Determined; MSA $100.00. Remaining counts dismissed. Voluntary Surrender Date December 4, 2013 before 2:00 p.m. Attorney Appearances: AUSA Linda Groves; Defense David M. Finn. (Court Reporter: Shawn McRoberts) (No exhibits) Time in

		Court :20. (chmb) (Entered: 09/25/2013)
09/25/2013	209	ELECTRONIC Minute Entry for proceedings held before Judge Jorge A Solis: Sentencing held on 9/25/2013 for John Michael Kelly (3), Count 1, Defendant placed on Probation for One (1) year; Restitution to be determined: MSA $100.00. Remaining counts dismissed. Attorney Appearances: AUSA Linda Groves; Defense - John M. Nicholson. (Court Reporter: Shawn McRoberts) (No exhibits) Time in Court - :10. (chmb) (Entered: 09/25/2013)
09/26/2013	210	JUDGMENT as to Joseph Roy Brown (2): Count 1, BOP for a term of Twelve (12) Months and One (1) day: Supervised Release Two (2) years; Restitution to be Determined; MSA $100. Counts 2-22, Dismissed on government's motion. (Ordered by Judge Jorge A Solis on 9/26/2013) (axm) (Entered: 09/26/2013)
09/26/2013	212	JUDGMENT as to John Michael Kelly (3): Count 1, Defendant placed on Probation for One (1) year; Restitution to be determined; MSA $100. Counts 2-22, Dismissed on government's motion. (Ordered by Judge Jorge A Solis on 9/26/2013) (axm) (Entered: 09/26/2013)

* * *

10/09/2013	216	MOTION for Release Pending Appeal filed by Michael Musacchio (Attachments: # 1 Proposed Order) (Ethington, Jay) (Entered: 10/09/2013)

* * *

11/19/2013	220	ELECTRONIC ORDER granting 216 Motion for Release Pending Appeal as to Michael Musacchio (1). All previous conditions of release are continued. (Ordered by Judge Jorge A Solis on 11/19/2013) (chmb) (Entered: 11/19/2013)
11/19/2013	221	Supplemental MOTION for Acquittal *Second Supplement to the Motion for Acquittal* filed by Michael Musacchio (Ethington, Jay) (Entered: 11/19/2013)
11/19/2013	222	JUDGMENT as to Michael Musacchio (1), Count(s) 1, 1s, 2s-3s, DISMISSED per JS chambers; Count(s) 1ss, BOP for a term of Sixty (60) Months as to Count 1; Supervised Release for Three (3) years as to Count 1; Restitution to be Determined; MSA $100.00; Count(s) 2ss-3ss, BOP for a term of Sixty Months as to Count 2 to run concurrent to Count 1; 3 Months as to Count 3 to run consecutive to Counts 1 and 2; Supervised Release Three years as to each Counts to run concurrent;

		Restitution to be determined; MSA $100 per count. Pursuant to LR 79.2 and LCrR 55.2, exhibits may be claimed during the 60-day period following final disposition (to do so, follow the procedures found atwww.txnd.uscourts.gov/Court Records). The clerk will discard exhibits that remain unclaimed after the 60-day period without additional notice. (Clerk to notice any party not electronically noticed.) (Ordered by Judge Jorge A Solis on 11/19/2013) (ykp) (Entered: 11/20/2013)
11/26/2013	224	NOTICE OF APPEAL to the Fifth Circuit as to 222 Judgment by Michael Musacchio. Filing fee $455, receipt number 70759. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. (twd) (Entered: 11/26/2013)
11/27/2013		Confirmation of receipt of payment from Kendall Law Group LLP in the amount of $455.00. Transaction posted on 11/26/2013. Receipt number DS070759 processed by yp. (ali) Lifted restriction on 11/27/2013 (ali). (Entered: 11/27/2013)
12/02/2013	225	RESPONSE AND OBJECTION by USA as to Michael Musacchio

		re: 199 Supplemental MOTION for Judgment of Acquittal Pursuant to Federal Rule of Criminal Procedure 29, 221 Supplemental MOTION for Acquittal *Second Supplement to the Motion for Acquittal*(Attachments: # 1 Exhibit(s) Transcript of 1st Sent. Hrg.) (Groves-DOJ, Linda) (Entered: 12/02/2013)
12/03/ 2013		USCA Case Number as to Michael Musacchio 13-11294 for 224 Notice of Appeal, filed by Michael Musacchio. (svc) (Entered: 12/03/2013)
12/03/ 2013	226	NOTICE OF ATTORNEY APPEARANCE by Elizabeth Hosea Lemoine appearing for Michael Musacchio (Filer confirms contact info in ECF is current.) (Lemoine, Elizabeth) (Entered: 12/03/2013)
12/04/ 2013	227	Transcript Order Form: re 224 Notice of Appeal, transcript requested for Jury TrialSentencing held on 2/19/2013-2/22/2013, 2/25/2013-2/28/2013, 3/1/2013, 7/3/2013, 9/5/2013 before Judge Solis. (Lemoine, Elizabeth) (Entered: 12/04/2013)
01/03/ 2014	228	Notice of Filing of Official Electronic Transcript of Motion to Quash Proceedings as to Michael Musacchio held on 08/14/2012 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number

		(214) 753-2349. * * * (smm) (Entered: 01/03/2014)
01/03/2014	229	Notice of Filing of Official Electronic Transcript of Motion to Suppres/Motion in Limine Proceedings as to Michael Musacchio held on 08/15/2012 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (Entered: 01/03/2014)
01/03/2014	230	Notice of Filing of Official Electronic Transcript of Trial Volume 1 of 8 Proceedings as to Michael Musacchio held on 02/19/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (Entered: 01/03/2014)
01/03/2014	231	Notice of Filing of Official Electronic Transcript of Trial Volume 2 of 8 Proceedings as to Michael Musacchio held on 02/20/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (Entered: 01/03/2014)
01/03/2014	232	Notice of Filing of Official Electronic Transcript of Trial Volume 3 of 8 Proceedings as to Michael Musacchio held on 02/21/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber

Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (Entered: 01/03/2014)

01/03/2014	233	Notice of Filing of Official Electronic Transcript of Trial Volume 4 of 8 Proceedings as to Michael Musacchio held on 02/22/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (Entered: 01/03/2014)
01/03/2014	234	Notice of Filing of Official Electronic Transcript of Trial Volume 5 of 8 Proceedings as to Michael Musacchio held on 02/25/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (Entered: 01/03/2014)
01/03/2014	235	Notice of Filing of Official Electronic Transcript of Volume 6 of 8 Proceedings as to Michael Musacchio held on 02/26/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (Entered: 01/03/2014)
01/03/2014	236	Notice of Filing of Official Electronic Transcript of Trial Volume 7 of 8 Proceedings as to Michael Musacchio held on 02/27/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber

		Shawn McRoberts. Telephone number (214) 753-2349. * * * (smm) (Entered: 01/03/2014)
01/03/2014	237	Notice of Filing of Official Electronic Transcript of Trial Volume 8 of 8 Proceedings as to Michael Musacchio held on 02/28/2013, 03/01/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts. Telephone number (214) 753-2349. * * * (smm) (Entered: 01/03/2014)
01/03/2014	238	Notice of Filing of Official Electronic Transcript of Sentencing Part 1 Proceedings as to Michael Musacchio held on 07/03/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts. Telephone number (214) 753-2349. * * * (smm) Modified on 1/3/2014 (aaa). (Entered: 01/03/2014)
01/03/2014	239	Notice of Filing of Official Electronic Transcript of Sentencing Part 2 Proceedings as to Michael Musacchio held on 09/05/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts. Telephone number (214) 753-2349. * * * (smm) (Entered: 01/03/2014)
01/15/2014	240	Transcript Redaction Request in case as to Michael Musacchio re: 232 , 233 , 234 Transcript filed by attorney Linda C Groves-DOJ

(Groves-DOJ, Linda) (Entered: 01/15/2014)

01/16/2014 241 Redacted Transcript for remote electronic access in case as to Michael Musacchio re: 232 Notice of Filing of Official Electronic Transcript of Trial Volume 3 of 8 Proceedings as to Michael Musacchio held on 02/21/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (smm) (Entered: 01/16/2014)

01/16/2014 242 Redacted Transcript for remote electronic access in case as to Michael Musacchio re: 233 Notice of Filing of Official Electronic Transcript of Trial Volume 4 of 8 Proceedings as to Michael Musacchio held on 02/22/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (smm) (Entered: 01/16/2014)

01/16/2014 243 Redacted Transcript for remote electronic access in case as to Michael Musacchio re: 234 Notice of Filing of Official Electronic Transcript of Trial Volume 5 of 8 Proceedings as to Michael Musacchio held on 02/25/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts,

Telephone number (214) 753-2349. * * * (smm) (smm) (Entered: 01/16/2014)

* * *

01/29/2014	251	Redacted Transcript for remote electronic access in case as to Michael Musacchio re: 231 Notice of Filing of Official Electronic Transcript of Trial Volume 2 of 8 Proceedings as to Michael Musacchio held on 02/20/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (smm) (Entered: 01/29/2014)
01/29/2014	252	Redacted Transcript for remote electronic access in case as to Michael Musacchio re: 232 Notice of Filing of Official Electronic Transcript of Trial Volume 3 of 8 Proceedings as to Michael Musacchio held on 02/21/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts. Telephone number (214) 753-2349. * * * (smm) (smm) (Entered: 01/29/2014)
01/29/2014	253	Redacted Transcript for remote electronic access in case as to Michael Musacchio re: 233 Notice of Filing of Official Electronic Transcript of Trial Volume 4 of 8 Proceedings as to Michael Musacchio held on 02/22/2013

		before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (smm) (Entered: 01/29/2014)
01/29/2014	254	Redacted Transcript for remote electronic access in case as to Michael Musacchio re: 236 Notice of Filing of Official Electronic Transcript of Trial Volume 7 of 8 Proceedings as to Michael Musacchio held on 02/27/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (smm) (Entered: 01/29/2014)
01/29/2014	255	Redacted Transcript for remote electronic access in case as to Michael Musacchio re: 239 Notice of Filing of Official Electronic Transcript of Sentencing Part 2 Proceedings as to Michael Musacchio held on 09/05/2013 before Judge Jorge A. Solis. Court Reporter/Transcriber Shawn McRoberts, Telephone number (214) 753-2349. * * * (smm) (smm) (Entered: 01/29/2014)
02/04/2014		Record on Appeal for USCA5 13-11294 (related to 224 appeal) as to Michael Musacchio: Record consisting of: ECF electronic record, 15 Volume(s) electronic transcript, original exhibits, 1

		envelope(s) PSR/SOR, Sealed or ex parte document number(s): 52,59112,118,120,122,161,190,198,202 ,204,214 (circuit approval is required for access), certified to USCA. To request a copy of the record (on disk or on paper), contact the appeals deputy in advance to arrange delivery. (svc) (Entered: 02/04/2014)
02/06/ 2014		Record on Appeal for USCA5 13-11294 (related to 224 appeal) as to Michael Musacchio: transmitted to US Attorney's Office on disk only by hand delivery (svc) (Entered: 02/06/2014)
02/06/ 2014		Record on Appeal for USCA5 13-11294 (related to 224 appeal) as to Michael Musacchio: transmitted to Kendall Law Group on disk only by hand delivery (svc) (Entered: 02/06/2014)
03/20/ 2014	257	Receipt for Return of Passport to US Department of State as to Michael Musacchio. Passport Number 439908295 issued by USA. (ctf) (Entered: 03/21/2014)
09/04/ 2014	258	TRIAL EXHIBITS by Michael Musacchio (svc) (Entered: 09/04/2014)
09/04/ 2014	259	EXHIBITS as to Michael Musacchio (svc) (Entered: 09/04/2014)
09/04/ 2014		Supplemental Record on Appeal for USCA5 13-11294 (related to 224 appeal) as to Michael

		Musacchio: Record consisting of: 1 ECF electronic record, certified to USCA. To request a copy of the record (on disk or on paper), contact the appeals deputy in advance to arrange delivery. (svc) (Entered: 09/04/2014)
09/05/ 2014		Supplemental Record on Appeal for USCA5 13-11294 (related to 224 appeal) as to Michael Musacchio: transmitted to US Attorney's Office (svc) (Entered: 09/05/2014)
11/26/ 2014		Return of Exhibits to US Attorney's Office. No exhibits remain in clerk custody. (EXH-ADM flag removed) Exhibits offered by USA as to Michael Musacchio. (svc) (Entered: 11/26/2014)
12/18/ 2014	260	Opinion of USCA in accordance with USCA judgment re 224 Notice of Appeal, filed by Michael Musacchio. (svc) (Entered: 12/18/2014)
12/18/ 2014	261	JUDGMENT/MANDATE of USCA as to 224 Notice of Appeal, filed by Michael Musacchio. The judgment of the District Court is affirmed (Attachments: # 1 USCA5 Letter) (svc) (Entered: 12/18/2014)
01/05/ 2015	262	ORDER as to Michael Musacchio: On this day, the Court considered the need to enter the following order. The above Defendant shall surrender to the Bureau of Prisons on Wednesday,

		2/11/2015 before 2:00p.m. It is therefore ORDERED that Defendant Michael Musacchio surrender to the Bureau of Prisons on 2/11/2015 before 2:00p.m. (Ordered by Chief Judge Jorge A Solis on 1/5/2015) (bdb) (Entered: 01/06/2015)
		* * *
07/02/2015	267	Received letter from USCA5: The petition for a writ of certiorari is granted. (axm) (Entered: 07/02/2015)

COURT OF APPEALS DOCKET ENTRIES

General Docket
United States Court of Appeals
for the 5th Circuit

Court of Appeals
Docket #: 13-11294

USA v Michael Musacchio

Appeal From: Northern District of Texas, Dallas

Fee Status: Fee Paid

Docketed: 11/27/2013
Termed: 11/10/2014

* * * * *

11/27/2013	2 pg, 93.56 KB	DIRECT CRIMINAL CASE docketed. NOA filed by Appellant Mr. Michael Musacchio [13-11294] (MVM)
12/04/2013		APPEARANCE FORM FILED by Attorney(s) Elizabeth Hosea Lemoine for party(s) Appellant Michael Musacchio, in case 13-11294 [13-11294] (NFD)

12/04/2013	APPEARANCE FORM FILED by Attorney(s) Elton Joe Kendall for party(s) Appellant Michael Musacchio, in case 13-11294 [13-11294] (NFD)
	* * *
12/17/2013	APPEARANCE FORM FILED by Attorney Jody Lynn Rudman for Appellant Michael Musacchio in 13-11294 [13-11294] (NFD)
01/06/2014	TRANSCRIPT FILED IN DISTRICT COURT Transcript Order: Court Reporter: Shawn McRoberts, Dt. Filed in Dist. Ct: 01/03/2014 Ct. Reporter Acknowledgment deadline canceled. Electronic ROA due on 01/21/2014. [13-11294] (MBC)
02/05/2014	ELECTRONIC RECORD ON APPEAL FILED. Exhibits on File in District Court? Yes (Trial Exhibits with Counsel). Electronic ROA deadline satisfied. [13-11294] (LBM)

02/05/2014	4 pg, 77.84 KB	BRIEFING NOTICE ISSUED A/Pet's Brief Due on 03/17/2014 for Appellant Michael Musacchio. [13-11294] (LBM)
02/05/2014		PHONE EXTENSION CONFIRMED for Appellant Mr. Michael Musacchio. Extension granted to and including 04/16/2014. A/Pet's Brief deadline updated to 04/16/2014 for Appellant Michael Musacchio [13-11294] (LBM)
02/05/2014	1 pg, 98.91 KB	LETTER filed by Appellant Mr. Michael Musacchio confirming 30 day extension of briefing deadline. Date of Service: 02/05/2014 via email - Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellee: Hendrix [13-11294] REVIEWED AND/OR EDITED. LETTER filed [13-11294] (Elizabeth Hosea Lemoine)
02/10/2014		ATTORNEY NOT PARTICIPATING. H. Jay Ethington is designated as inactive in this case. Reason:Not attorney in the case, and incorrect law firm added. [13-11294] (MFY)

03/21/2014	5 pg, 39.13 KB	UNOPPOSED MOTION filed by Appellant Mr. Michael Musacchio to extend time to file brief as appellant until 05/16/2014 at 05:00 pm [7592597-2]. Date of service: 03/21/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellee: Hendrix [13-11294] (Elton Joe Kendall)
03/24/2014	1 pg, 52.12 KB	CLERK ORDER granting in part motion to extend time to file appellant's brief filed by Appellant Mr. Michael Musacchio [7592597-2] A/Pet's Brief deadline updated to 05/01/2014 for Appellant Michael Musacchio. [13-11294] (MFY)

05/01/ 2014	71 pg, 228.98 KB	APPELLANT'S BRIEF FILED by Mr. Michael Musacchio. Date of service: 05/01/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellee: Hendrix [13-11294] REVIEWED AND/OR EDITED. # of Copies Provided: 0 A/Pet's Brief deadline satisfied. Appellee's Brief due on 06/03/2014 for Appellee United States of America. Paper Copies of Brief due on 05/12/2014 for Appellant Michael Musacchio. [13-11294] (Jody Lynn Rudman)
05/01/ 2014	212 pg, 9.16 MB	RECORD EXCERPTS FILED by Appellant Mr. Michael Musacchio. Date of service: 05/01/2014 via email - Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellee: Hendrix [13-11294] REVIEWED AND/OR EDITED. # of Copies Provided: 0 Paper Copies of Record Excerpts due on 05/12/2014 for Appellant Michael Musacchio. [13-11294] (Jody Lynn Rudman)

05/01/ 2014	147 pg, 1.94 MB	ADDENDUM FILED by Appellant Mr. Michael Musacchio Date of Service: 05/01/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellee: Hendrix [13-11294] REVIEWED AND/OR EDITED. # of Copies Provided: 0 Paper Copies of Addendum due on 05/12/2014 for Appellant Michael Musacchio. [13-11294] (Jody Lynn Rudman)
05/01/ 2014	5 pg, 1.72 MB	LETTER filed by Appellant Mr. Michael Musacchio Letter advising Court of trial exhibits maintained by parties. Date of Service: 05/01/2014 via email Attorney for Appellants: Kendall. Lemoine, Rudman; Attorney for Appellee: Hendrix [13-11294] [SEND TO SCREENING JUDGE AND PANEL] (Jody Lynn Rudman)
05/06/ 2014		APPEARANCE FORM FILED by Attorney(s) Brian W McKay for party(s) Appellee USA, in case 13-11294 [13-11294] (NFD)

05/12/ 2014	Paper copies of appellant brief filed by Appellant Mr. Michael Musacchio in 13-11294 received. Paper copies match electronic version of document? Yes # of Copies Provided: 7 Paper Copies of Brief due deadline satisfied. [13-11294] (NFD)
05/12/ 2014	Paper copies of record excerpts filed by Appellant Mr. Michael Musacchio in 13-11294 received. Paper copies match electronic version of document? Yes # of Copies Provided: 4. Paper Copies of Record Excerpts due deadline satisfied. [13-11294] (NFD)
05/12/ 2014	Paper copies of addendum brief filed by Appellant Mr. Michael Musacchio in 13-11294 received. Paper copies match electronic version of document? Yes # of Copies Provided: 7 Paper Copies of Addendum due deadline satisfied. [13-11294] (NFD)

05/30/ 2014		PHONE EXTENSION CONFIRMED for Appellee USA. Extension granted to and including 07/03/2014. E/Res's Brief deadline updated to 07/03/2014 for Appellee United States of America [13-11294] (MCS)
07/03/ 2014	3 pg, 53.31 KB	UNOPPOSED MOTION filed by Appellee USA to file brief in excess of the word count limitation but not to exceed 17,067 words [7673865-2]. Date of service: 07/03/2014 via email - Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellee: McKay [13-11294] (Brian W McKay)

07/03/ 2014	90 pg, 406.26 KB	APPELLEE'S BRIEF FILED by Appellee USA. Date of service: 07/03/2014 via email Attorney for Appellants: Kendall. Lemoine, Rudman; Attorney for Appellee: McKay [13-11294] REVIEWED AND/OR EDITED. APPELLEE'S BRIEF FILED # of Copies Provided: 0 E/Res's Brief deadline satisfied. Paper Copies of Brief due on 07/08/2014 for Appellee United States of America.. Reply Brief due on 07/21/2014 for Appellant Michael Musacchio [13-11294] (Brian W. McKay)
07/03/ 2014	1 pg, 59.99 KB	CLERK ORDER granting motion to file brief in excess of word count limitation but not to exceed 17,067 words filed by Appellee USA [7673865-2]. [13-11294] (NFD)
07/03/ 2014		PHONE EXTENSION CONFIRMED for Appellant Mr. Michael Musacchio. Extension granted to and including 07/28/2014. Reply Brief deadline updated to 07/28/2014 for Appellant Michael Musacchio [13-11294] (MVM)

07/08/ 2014		Paper copies of appellee brief filed by Appellee USA in 13-11294 received. Paper copies match electronic version of document? Yes # of Copies Provided: 7. Paper Copies of Brief due deadline satisfied. [13-11294] (NFD)
07/14/ 2014	4 pg, 36.57 KB	UNOPPOSED MOTION filed by Appellant Mr. Michael Musacchio to extend time to file reply brief until 08/11/2014 at 11:59 pm [7681566-2]. Date of service: 07/14/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellees: Hendrix. McKay [13-11294] (Elton Joe Kendall)
07/15/ 2014	1 pg, 52.11 KB	CLERK ORDER granting in part motion to extend time to file reply brief filed by Appellant Mr. Michael Musacchio [7681566-2] Reply Brief deadline updated to 08/04/2014 for Appellant Michael Musacchio. [13-11294] (MFY)

07/30/2014	1 pg, 62.31 KB	CASE TENTATIVELY calendared for oral argument for the week of 10/06/2014. [13-11294] (GAM)
08/04/2014	3 pg, 26.1 KB	UNOPPOSED MOTION filed by Appellant Mr. Michael Musacchio to file brief in excess of the word count limitation but not to exceed 8810 words [7698028-2]. Date of service: 08/04/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellees: Hendrix, McKay [13-11294] (Jody Lynn Rudman)

08/04/ 2014	47 pg, 115.02 KB	APPELLANT'S REPLY BRIEF FILED by Mr. Michael Musacchio Date of service: 08/04/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellees: Hendrix, McKay [13-11294] REVIEWED AND/OR EDITED. Brief NOT Sufficient: Excess Word Count. Instructions to Attorney: PLEASE READ THE ATTACHED NOTICE FOR INSTRUCTIONS ON HOW TO REMEDY THE DEFAULT # of Copies Provided: 0 Reply Brief deadline satisfied. Sufficient Brief due on 08/11/2014 for Appellant Michael Musacchio. [13-11294] (Elton Joe Kendall)
08/07/ 2014	2 pg, 96.2 KB	COURT ORDER appellant's unopposed motion to file reply brief in excess of the word limitation, but not to exceed 8,810 words is GRANTED. [7698028-2] Judge(s): PRO [13-11294] (NFD)

08/07/ 2014	1 pg, 60 KB	BRIEF MADE SUFFICIENT filed by Appellant Mr. Michael Musacchio in 13-11294 [7698037-2]. Additional number of copies provided: 0 Sufficient Brief deadline satisfied. Paper Copies of Brief due on 08/12/2014 for Appellant Michael Musacchio. [13-11294] (NFD)
08/12/ 2014		Paper copies of appellant reply brief filed by Appellant Mr. Michael Musacchio in 13-11294 received. Paper copies match electronic version of document? Yes # of Copies Provided: 7 Paper Copies of Brief due deadline satisfied. [13-11294] (NFD)
08/20/ 2014		CASE CALENDARED for oral argument on Wednesday, 10/08/2014 in New Orleans in the West Courtroom -- AM session. In accordance with our policy, lead counsel only will receive via email at a later date a copy of the court's docket and an acknowledgment form. All other counsel of record should monitor the court's website for the posting of the oral argument calendars.. [13-11294] (PFT)

09/04/ 2014		SUPPLEMENTAL ELECTRONIC RECORD ON APPEAL FILED. PSI included? No. [13-11294] (MRB)
09/04/ 2014		Exhibits, 1 env (1 CD-All Trialand Sentencing Exhibits). FILED [13-11294] (NFD)
09/08/ 2014		Exhibits, 1 env. (CD of Trial and Sentencing Exhibits) , FILED [13-11294] (NFD)
09/10/ 2014	2 pg, 81.9 KB	SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellee USA Date of Service: 09/10/2014 via email Attorney for Appellants: Kendall, Rudman; Attorney for Appellee: McKay [13-11294] (Brian W McKay)
09/12/ 2014	2 pg, 80.3 KB	SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellee USA Date of Service: 09/12/2014 via email Attorney for Appellants: Kendall, Rudman; Attorney for Appellee: McKay [13-11294] (Brian W McKay)

09/15/2014	5 pg, 30.94 KB	OPPOSED MOTION filed by Appellant Mr. Michael Musacchio to strike 28j letter filed by Appellee USA in 13-11294 [7728600-2], 28j letter filed by Appellee USA in 13-11294 [7726661-2] [7730211-2] and INCORPORATED RESPONSE to the 28j letter filed by Appellee USA in 13-11294 [7728600-2], 28j letter filed by Appellee USA in 13-11294 [7726661-2] Date of service: 09/15/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellees: Hendrix, McKay [13-11294] (Elton Joe Kendall)
09/16/2014		RESPONSE DUE to motion to strike 28j letters filed by Appellant Mr. Michael Musacchio in 13-11294 [7730211-2]Response/Opposition due on 09/29/2014 [13-11294] (MFY)

09/17/ 2014	2 pg, 100.45 KB	COURT ORDER denying appellant's opposed motion to strike the appellee's Rule 28(j) letters filed September 10 and 12, 2014. This ruling is not intended as a comment on the applicability of the authorities cited. The appellant is permitted, but not required, to respond to the objected-to submissions. [7730211-2] [13-11294] (MFY)
09/22/ 2014	2 pg, 61.25 KB	RESPONSE to RULE 28(j) filed by Mr. Michael Musacchio [7735990-1] to the 28j letter filed by Appellee USA in 13-11294 [7726661-2] Date of Service: 09/22/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellees: Hendrix, McKay. [13-11294] REVIEWED AND/OR EDITED. to the 28j letter filed by Appellee USA in 13-11294 [7726661-2] [13-11294] (Jody Lynn Rudman)

10/01/2014	2 pg, 61.49 KB	RESPONSE filed by Appellant Mr. Michael Musacchio [7743880-1] to the 28j letter filed by Appellee USA in 13-11294 [7728600-2] Date of Service: 10/01/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellees: Hendrix, McKay. [13-11294] REVIEWED AND/OR EDITED. RESPONSE filed by Appellant Mr. Michael Musacchio to the 28j letter filed by Appellee USA in 13-11294 [7728600-2] [13-11294] (Jody Lynn Rudman)
10/08/2014		ORAL ARGUMENT HEARD before Judges Smith, Barksdale, Haynes. Arguing Person Information Updated for: Elton Joe Kendall arguing for Appellant Michael Musacchio; Arguing Person Information Updated for: Brian W. McKay arguing for Appellee United States of America [13-11294] (PFT)

11/10/ 2014	16 pg, 191.43 KB	UNPUBLISHED OPINION FILED. [13-11294 Affirmed] Judge: JES , Judge: RHB Judge: CH. Mandate pull date is 12/01/2014 for Appellant Michael Musacchio [13-11294] (JRS)
11/10/ 2014	1 pg, 34.6 KB	JUDGMENT ENTERED AND FILED. [13-11294] (JRS)
11/21/ 2014	42 pg, 228.43 KB	PETITION filed by Appellant Mr. Michael Musacchio for rehearing en banc [7782976-2]. Date of Service: 11/21/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellees: Hendrix, McKay [13-11294] (Elton Joe Kendall)
11/24/ 2014	1 pg, 59.76 KB	PAPER COPIES REQUESTED for the petition for rehearing en banc filed by Appellant Mr. Michael Musacchio in 13-11294 [7782976-2]. Mandate pull date canceled.. Paper Copies of Rehearing due on 12/01/2014 for Appellant Michael Musacchio. [13-11294] (NFD)

11/26/ 2014		Paper copies of petition for rehearing en banc filed by Appellant Mr. Michael Musacchio in 13-11294 received. Paper copies match electronic version of document? Yes # of Copies Provided: 0. Paper Copies of Rehearing due deadline satisfied. [13-11294] (NFD)
12/09/ 2014	3 pg, 116.97 KB	COURT ORDER denying petition for rehearing en banc filed by Appellant Mr. Michael Musacchio [7782976-2] Without Poll. Mandate pull date is 12/16/2014 [13-11294] (NFD)
12/15/ 2014	39 pg, 2.21 MB	OPPOSED MOTION filed by Appellant Mr. Michael Musacchio to stay issuance of the mandate for 90 days, or until March 17, 2015. [7798968-2]. Date of service: 12/15/2014 via email Attorney for Appellants: Kendall, Lemoine, Rudman; Attorney for Appellees: Hendrix, McKay [13-11294] (Elton Joe Kendall)

12/16/ 2014	2 pg, 104.07 KB	COURT ORDER- The appellant's opposed motion for stay of the mandate pending the filing of a petition for writ of certiorari is DENIED. [7798968-2] Judge(s): JES. [13-11294] (NFD)
12/17/ 2014	16 pg, 282.17 KB	MANDATE ISSUED. Mandate pull date satisfied. [13-11294] (NFD)
03/13/ 2015	1 pg, 55.03 KB	SUPREME COURT NOTICE that petition for writ of certiorari [7863703-2] was filed by Appellant Mr. Michael Musacchio on 03/09/2015. Supreme Court Number: 14-1095. [13-11294] (LGL)
06/30/ 2015	3 pg, 170.53 KB	SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellant Mr. Michael Musacchio in 13-11294 on 06/29/2015. [7949895-1] [13-11294] (CAV)

ORIGINAL INDICTMENT, NOV 2, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES	§	
OF AMERICA	§	
	§	
V	§	NO.
	§	[3 10-CR-00308-P]
	§	
MICHAEL MUSACCHIO (1)	§	
JOSEPH TAYLOR	§	
(ROY) BROWN (2)	§	
JOHN MICHAEL KELLY (3)	§	
	§	

INDICTMENT

The Grand Jury Charges:

Introduction

At all times material to this indictment:

1. Exel Transportation Services, Inc. (Exel), formerly known as Mark VII Transportation Co., Inc. (Mark VII), had offices in Addison and Dallas, Texas, Memphis, Tennessee and elsewhere, and conducted business in the Northern District of Texas, Dallas Division, and elsewhere.

2. Total Transportation Services LLC conducted business in the Northern District of Texas, Dallas Division, and elsewhere as Worldwide Total Transportation Services GP LLC and was the general partner of the entity operated as Total Transportation Services LP doing business as Worldwide Total Transportation Services LP Total Transportation Services LLC and Total Transportation Services LP operated as Total Transportation Services (TTS). TTS was formed on or about November 15, 2005.

3. TTS and Exel were competitors. Exel was a third party logistics company or intermodal marketing company which provided transportation and supply chain management products and services that facilitated the links between shippers and common carriers in the manufacturing, retail and consumer industries. Exel entered into contracts with independent agents and independent sales agents. Through these contractual arrangements and the utilization of in-house sales agents, Exel connected shipping customers with appropriate carriers and provided products, services and technology to assist its customers to transport goods. ITS, as Exel's competitor, was also a third party logistics company which offered similar types of business services and products, and utilized similar types of contracts with independent agents and independent sales agents.

4. Michael J. Musacchio, from in or about 1992, and continuing through on or about September 9, 2004, was employed by Exel and its predecessor Mark VII in high level supervisory, management and officer positions. From in or about 2000, through in or about September 9, 2004, Musacchio was the Presi-

dent and Chief Executive Officer of Exel Musacchio left his position with Exel on or about September 9, 2004. From in or about November 2005 through in or about April 2006, Musacchio was employed by TTS as the President and CEO. Musacchio was one of the initial Directors on the Board of Directors of TTS and held equity ownership in TTS.

5. Joseph Taylor Brown, also known as Roy Brown, worked for Exel and its predecessor Mark VII from in or about August 1999 until on or about October 17, 2005. At the time Brown left Exel, Brown's position was Vice President of Agency Support which was primarily an Information Technology position. Brown agreed to accept a position with TTS on or about October 21, 2005, as the Vice President for Information Technology. From in or about October 2005 through in or about April 2006, Brown was employed by ITS. Before Brown left TTS, he held an equity ownership interest in TTS.

6. John Michael Kelly worked for Exel from on or about October 2, 2000 until his resignation on or about October 27, 2005. At the time of his resignation, Kelly worked as the Senior Network Engineer for Exel. As an information technology specialist or network administrator, Kelly had administrator level access to all of the networked computers and internal email systems at Exel, including administrator-level access to Exel's computer network. After leaving Exel until on or about October 27, 2010, Kelly was employed as Manager IT-Infrastructure for TTS.

7 At all times relevant to this indictment, the email servers of Exel were located at the corporate offices of Exel in Memphis, Tennessee. In addition,

Musacchio, Brown and Kelly, while employed by Exel, worked at the Exel offices in Dallas, Texas and Addison, Texas. All Exel employees were bound by the Exel "Employment and Noncompete Agreement" and the "Exel Transportation Services, Inc. E-Mail and Telephonic Communications Employee Acknowledgment Form." 8. Unindicted coconspirators no. 1, 4, and 5 were employees of Exel who became employees of TTS after Musacchio and Brown left Exel. Unindicted coconspirators no. 2 and 3 were financiers.

Count One

Conspiracy To Make Unauthorized Access to Protected Computer and To Exceed Authorized Access to Protected Computer (Violation of 18 U.S.C. § 371 (conspiracy to violate 18 U.S.C. §§ 1030(a)(2)(C); (c)(2)(B)(i)-(iii) (unauthorized access and exceeding authorized access));

1. The Grand Jury realleges and incorporates the allegations of paragraphs 1-8 of the Introduction to the Indictment.

Object of the Conspiracy

2. From at least in or about April 2004 and continuing through in or about March 2006, in the Dallas Division of the Northern District of Texas and elsewhere, defendants Michael Musacchio, Joseph Taylor (Roy) Brown and John Michael Kelly, aided and abetted by each other, did unlawfully, willfully, and knowingly combine, conspire, confederate and agree among themselves, with each other and with other persons known and unknown to the Grand Jury, to commit offenses against the United States, specifically, to intentionally access a computer without authorization and exceed authorized access to a protected

computer, as defined at 18 U.S.C. § 1030(e)(2)(B), and thereby obtain information, and the offense was committed for purposes of commercial advantage and private financial gain and in furtherance of a criminal and tortious act in violation of the Constitution or laws of the United States or of any state, including the State of Texas, and the value of the information obtained exceeded $5,000, in violation of 18 U.S.C. § 371 (conspiracy to violate 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i)-(iii) (unauthorized access and exceeding authorized access to a protected computer)).

Manner and Means

A. Musacchio and Brown made unauthorized access and exceeded authorized access to Exel's protected computers including the Exel mail server from their personal internet accounts, their assigned user accounts at the offices of TTS, and the administrator accounts at Exel, and obtained Exel emails, email attachments, and other business documents containing Exel's confidential and proprietary information. They did so to provide a commercial advantage and private financial gain to TTS, themselves, Kelly, and the unindicted coconspirators.

B. Musacchio and Brown obtained administrative passwords and login information to Exel's protected computers from Kelly and made unauthorized access and exceeded any authorized access to Exel's protected computers. They did so to provide a commercial advantage and private financial gain to TTS, themselves, Kelly and the unindicted coconspirators.

C. Musacchio directed unindicted coconspirators, who were employed by Exel during the time of the conspiracy, to exceed any authorized access to Exel's

protected computers, and to obtain Exel's emails, email attachments, and other business documents containing Exel's confidential and proprietary information. He did so to provide a commercial advantage and private financial gain to himself, TIS, Brown, Kelly and the unindicted coconspirators.

D. Brown made unauthorized access to and exceeded his authorized access to Exel's protected computers and obtained Exel's emails, email attachments, and other business documents containing Exel's confidential and proprietary information. Brown frequently forwarded Exel's confidential, proprietary emails and documents to Musacchio and other unindicted coconspirators. He did so to provide a commercial advantage and private financial gain to himself, TTS, Musacchio, Kelly and the unindicted coconspirators.

E. Brown obtained administrative passwords and login infon'nation to Exel's protected computers from Kelly and provided the passwords and login information to Musacchio to enable him to make unauthorized access to the protected computers of Exel and to defraud Exel of its proprietary information and business documents for the benefit of Musacchio, Brown, Kelly, the unindicted coconspirators and TTS.

F. Kelly, while employed by Exel, instructed an Exel IT employee that he should not change the administrative passwords' on the Exel computer servers even after Kelly and Brown left Exel. The retention of the same administrative passwords provided continued unauthorized access to Exel's protected computers after Kelly, Brown, and Musacchio left Exel's em-

ployment and became employees of TTS, Exel's competitor.

G. Kelly provided the. Exel passwords and login information to Brown. Brown provided the Exel passwords and login information to Musacchio, to enable Brown, Kelly and Musacchio to make unauthorized access to the protected computers of Exel. He did so to provide a commercial advantage and private financial gain to Musacchio, Brown, Kelly, the unindicted coconspirators, and ITS.

Overt Acts

In furtherance of the conspiracy and to achieve its objects, defendants Michael Musacchio, Joseph Taylor (Roy) Brown, and John Michael Kelly committed and caused to be committed, among others, the following overt acts in the Northern District of Texas, and elsewhere:

2004-2005

1. In or about April 2004, Musacchio and unindicted coconspirators No.2 and 3, discussed the funding for the formation of a new company, later to be called TTS (the funding initiative was referred to as "Otra Vez"), which would compete with Exel in the transportation services industry. The participants agreed upon the initial management group of TTS, and entered into an agreement to obtain Exel's proprietary and confidential information for the benefit of TTS.

2. On or about September 7, 2004, Musacchio resigned from his position as president of Exel effective September 9, 2004. On or about September 7, 2004, Musacchio and Brown discussed how Musacchio

could access Exel's protected computers without authorization after Musacchio left Exel's employment.

3. On or about September 30, 2004, Musacchio sent an email with attachment to unindicted coconspirators No.2 and 3 from his personal comcast.net account with the message "here is the.ETS 2005 budget plan." The attachment was the budget plan which was dated after Musacchio had left Exel.

4. On or about December 21, 2004, Brown exceeded his authorized access to the Exel email server and to the email account of an Exel employee known to the grand jury. Brown used his Blackberry and forwarded an email he had obtained from the Exel employee's account to Musacchio at Musacchio's comcast.net account with the message: "Some email between Jim and Andrew ..... Maybe ETS is for sale?"

5. On or about January 7, 2005, Brown exceeded authorized access to the Exel email server and to the account of a person known to the grand jury. Brown used his bellsouth.net account to forward an email message from that account to Musacchio at his comcast.net account with the subject line "You will enjoy this....." Musacchio replied by email to Brown "This is great stuff! Thanks."

6. On or about February 21, 2005, an Exel employee known to the grand jury sent an email to Musacchio in which he asked Musacchio not to send items to his Exel email account due to the "covertness of this operation."

7 On or about April 22, 2005, Brown, while working at Exel, exceeded his authorized access and accessed the Exel email accounts for Exel employees. Brown obtained copies of email messages and at-

tachments containing Exel proprietary business plans which he forwarded to Musacchio at Musacchio's comcast.net account. Musacchio replied to Brown by return email and made the following request: "Roy, if you can keep watch for replies to this email or anything else related to it, that would be very helpful" Brown responded, "Doing my best."

8. On or about May 16, 2005, Musacchio and an independent agent met with other persons known to the grand jury to discuss a revised business plan for a new business entity which would compete with Exel.

9. On or about August 23, 2005, Brown and Musacchio exchanged emails in which Brown provided Musacchio with Exel's proprietary agency information which he had obtained from Exel's email accounts by exceeding his authorized access to Exel's servers. Musacchio emailed Brown that "this will be helpful," then requested Brown provide additional emails from the email account of Exel's president. Brown responded that it was possible for him to provide additional emails from that account and asked if there was specific information he should look for.

10. On or about August 30, 2005, Brown exceeded his authorized access for the email account of "Ets.Offices.All@Ets.Exel.Com" and forwarded an email message sent from "bill.reed@ets.exel.com" to his home email account with bellsouth.net. Brown then forwarded the message from his home account to Musacchio at Musacchio's comcast.net account.

11. On or about September 1, 2005, Brown emailed Exel's proprietary information to Musacchio concerning the possible future acquisition of Exel. Musacchio

responded to Brown that "this ... is going to fall right into our plan."

12. On or about September 20, 2005, Brown exceeded his authorized access to Exel's email server and to the account of the Exel president. He used his bellsouth.net account to send a copy of an email from the president's Exel account concerning the president's board presentation with an attached spreadsheet to Musacchio at Musacchio's comcast.net account. Musacchio replied to Brown "you are the Man!"

13. On or about September 20, 2005, Brown exceeded his authorized access to Exel's email server and to the email account of Exel's president, and obtained a file "Phantom Stock Option programme.xls." He then used his bellsouth.net account to send the file to Musacchio at Musacchio's comcast.net account. Musacchio replied by email: "You are on fire! Take a look at Toad's email and see if he is sucking up to Jim!"

Brown then responded: "he is about as much out of the loop as Steve. I have looked but to no great [findings [sic]."

14. Beginning on or about September 20, 2005 and continuing through March 25, 2006, a TTS user account assigned to Brown used the TTS servers to log onto the Exel servers. Brown exceeded his authorized access to Exel servers in this manner prior to leaving Exel on October 17, 2005, and acted without authorized access after that date. While logged on, the TTS account accessed the email accounts of Exel's president, vice president and other Exel employees more than 300 times.

15. On or about September 21, 2005, Brown exceeded his authorized access to the Exel email server and to the email account of the Exel president. He used his bellsouth.net account to forward an email from the Exel presid to another employee's account to Musacchio at Musacchio's comcast.net account with the subject line "From Jim to Andrew." On that date Brown also exceeded authorized.a9cess to the Exel email server, and used his bellsouth.net account to forward to Musacchio at Musacchio's comcast.net account an email with attachments concerning proposed corporate changes which was sent from the Exel president to "Andrew/Tony."

16. On or about October 10, 2005, Brown exceeded authorized access to the Exel email server. Brown sent an email from his bellsouth.net account to Musacchio at Musacchio's comcast.net account with the subject line: "Interesting reading ....."

17. On or about October 10, 2005, Brown exceeded his authorized access to the Exel email server and to the email account of Exel's president. Brown forwarded a copy of an email from the president's account to Musacchio. Musacchio replied to Brown, "This is great! ...as long as Exel has something else to focus on, it will keep us off of their radar screen! ... Isn't there a way (when the time is right for us to write and email as Brad to Jim and really make some bogus shit up for them to get excited about? [sic]" Brown responded "Yes and it sounds like fun ... that would really [expletive deleted] with their heads!" Musacchio then emailed to Brown "I would like to compose an email from Brad to Jim. Can we do it and

not have it traced?" On or about October 11, 2005, Brown responded "Yes, of course."

18. On or about October 14, 2005, Brown exceeded his authorized access to Exel's email server and to the email account of Exel's president. Brown used his bellsouth.net account and forwarded an email from the president's account to Musacchio at Musacchio's comcast.net account with the subject line: "RE: You will enjoy this ..... "Musacchio replied by email and wrote: "Thanks. Now the next question is, how are we going to get into email after you leave?" Brown replied: "Not a problem.....I have the back door password that only I know and no one else can change." Musacchio emailed back to Brown "beauty!"

19. On or about October 14, 2005, Musacchio emailed Brown from his comcast.net account with the subject line "Follow Up," and asked Brown to "Please keep looking in Brad's email to see if there id [sic] any information being passed to him from Frito-Lay about a meeting I will be having with them. Thanks."

20. On or about October 26, 2005, Brown sent Musacchio an email from Exel Legal Counsel to Exel's president that he obtained by an unauthorized access to Exel's email server: The email to Musacchio had the subject line "from Dick to Jim." On the same date, Musacchio forwarded the email to unindicted coconspirator no. 2.

21. On or about October 29, 2005, Musacchio emailed Brown and directed "When you are perusing Jim or Andrew's email, please look for monthly/weekly financials. Thanks." Brown replied by email "What month do you want? I have everything up until

I left which is through September. October numbers will be next week."

22. In or about October 2005, before Brown left Exel's employment, Kelly showed Brown how to access Exel's email system via the internet. Kelly showed Brown how to use an administrator-level account access Exel employees' individual email accounts.

23. On or about October 27, 2005, Musacchio forwarded an email to a person known to the, grand jury which had been obtained without authorization from Exel servers. The email which Musacchio forwarded was from Exel counsel to the Exel president concerning the fact that no Federal Maritime Commission Application existed for Musacchio.

24. On or about November 1, 2005, Brown made unauthorized access to the Exel email server and accessed the email account of the Exel president. He then used his bellsouth.net account to forward an email from the president's account to Musacchio at Musacchio's comcast.net account with the subject line: "How funny is this shit!"

25. On or about November 3, 2005, unindicted coconspirator no. 1 used her Hotmail account and sent an email to Musacchio containing information about phone calls she had overheard the company president making at Exel's office. Musacchio thanked her and told her "this is good stuff." Musacchio then used his comcast.net email account to email Brown with the subject line "FW: Edie, and other misc. gossip." In the email Musacchio wrote: "Confidential to you, but stay close to Jim's email. This is going to get interesting! Please do not let [unindicted coconspirator no. 1]

know that I passed this to you! Thanks." Brown responded from his bellsouth.net email account and stated " ... I will get back in the email and see what all is taking place."

26. On or about November 7, 2005, Brown made unauthorized access to the Exel email server and accessed the email account of the Exel president. He then used his bellsouth.net account to forward an email in the president's account to Musacchio at Musacchio's comcast.net account with the the subject line: "From Jim to Dan/Andrew/Tony." Musacchio then sent the email to unindicted coconspirator no. 1 with the message, "You didn't see this. ok."

27 On or about November 8, 2005, Brown made an unauthorized access to Exel's email server and the account of Exel's president and copied an email from the account. Brown then emailed Musacchio at Musacchio's comcast.net account the email he had copied from Exel's server with the subject line "Talk between Jim and Dan." On or about November 9, 2005, Musacchio forwarded this email to his wife and admonished her not to say anything about what he was doing.

28. On or about November 9, 2005, Brown made an unauthorized access to Exel's email server and to the email account of Exel's president. Brown forwarded a copy of an email string between Exel's president and Exel's Legal Counsel which had the subject line "Organizational Announcement" to Musacchio with his subject line "They have no idea!!!!!!!!"

29. On or about November 11, 2005, Kelly, began training an Exel employee to replace him. Kelly told the Exel employee how to maintain and operate the

computer systems at Exel and instructed him not to change the system passwords.

30. On or about November 20, 2005, Musacchio sent an email to unindicted coconspirator no. 5, an Exel employee, to thank him for sending Exel's proprietary "Salesperson Comparison" information to him and asking whether he also had YTD figures for sales personnel. 5 had sent the Exel proprietary information without authorization.

31. On or about November 21, 2005, unindicted coconspirator no. 4, an Excel employee, contacted Musacchio concerning a directive he had received from the Excel President and CEO regarding agents. On that date Musacchio emailed unindicted coconspirator no. 2 requesting a meeting to discuss a TTS Board of Directors' resolution that Musacchio believed was needed.

32. Beginning on or about November 23, 2005, and continuing through on or about February 12, ,2006, the TTS user account belonging to Musacchio was used to log onto the Exel mail servers without authorization and to access the email accounts of Exel employees approximately 3,000 times.

33. On or about November 24, 2005, Musacchio emailed Brown from his TTS email account to inform Brown that the Exel web mail server was down and he could not access the email accounts of Exel employees. Musacchio's message read: "When you get a chance, try to get onto ETS's Webmail. Everything was fine last night, but tonight I get an error message that says "Failed to Connect to Mail Server." I didn't do anything that would lock me out. Maybe the server is down?" On November 25, 2005, Brown replied to

Musacchio from his TTS email account that: "Looks like the server is down.....guess we will have to wait until someone figures that out." Musacchio replied: "ok, thanks." Later Brown emailed Musacchio to let him know that he had restarted the Exel email server remotely and said "It's working now.....I restarted it remotely.....I guess they have not changed a single password!"

34. On or about November 26, 2005, Musacchio emailed other persons known to the grand jury, and attached a copy of a confidential Exel memo describing Exel's 2006 Agent Retention/Incentives for keeping agents.

35. On or about November 28, 2005, a person known to the grand jury emailed Musacchio and expressed his concern about the legal risks of sending and receiving Exel documents and stated, "We don't want to give Exel grounds for legal action."

2006

36. On or about January 6, 2006, Brown sent an email to Musacchio in which he wrote "Go into the "email" and look at the sent items for JD."

37. On or about January 6, 2006, Brown made unauthorized access to the Exel email servers, to the account of a person known to the grand jury, and then emailed Musacchio information from the email concerning a hold on the checks of sales agents.

38. On or about January 7, 2006, Musacchio sent an email to Brown, unindicted coconspirators no. 1, no. 3, and other persons known and unknown to the grand jury, in which he asked that they keep "confi-

dential information" that he had provided to them a secret. Musacchio warned them that disclosure of the confidential information would "destroy other people's careers."

39. On or about January 7, 2006, Brown signed an employment offer letter accepting employment with TTS which was countersigned by Musacchio as President and CEO of TTS and which stated that his employment with TTS became effective on October 24, 2005.

40. On or about January 7, 2006, Musacchio sent an email to Brown with the subject line "ETS Email" and, the message "Do you think we are locked out forever??"

41. On or .about January 8, 2006, Brown sent Kelly an email stating "Hey, my back door to you know where is locked out. Do you know another way in?" On or about January 8, 2006, Kelly replied to Brown via email with the user names and passwords for the "Exchange_service," "BESAdmin, " and "Delano.service" administrator-level accounts that enabled Brown to make unauthorized access to Exel's protected computers. Brown emailed Musacchio later with the subject line "Back door Success" and wrote "I AM IN!!!!!!!!!! Several hours later I can see again!"

42. On or about January 12, 2006, Musacchio emailed Brown with the subject line "Load Tech" and with a message that an Exel employee "found out we are using Load Tech." Brown replied by email "Do you know how?" Musacchio then emailed Brown the message "Email said someone told her." Brown emailed back to Musacchio "...I will look in her email tomorrow."

43. On or about January 17, 2006, Musacchio sent an email to Brown with a subject line "Go hunting." The message indicated that Musacchio wanted Brown to look at the email boxes of the Exel president, legal counsel, vice president and another officer. Brown responded that he was heading to dinner, but that when he got to the apartment he would "dig deep."

44. On or about January 18, 2006, Brown made an unauthorized access to the Exel email server and the account of the Exel president. Brown sent an email to Musacchio with the subject line "Unbelievable email between Jim and Dick.....they are paranoid!" to which he attached an email exchange between the Exel president and Exel legal counsel.

45. On or about January 20, 2006, Brown made an unauthorized access to the Exel email server and obtained the Exel Weekly update, Exel's proprietary document, which he emailed to Musacchio and unindicted coconspirator no. 1.

46. On or about January 21, 2006, Brown made unauthorized access to Exel's email server and to the email account of Exel's legal counsel. He then forwarded a message taken from that account with the subject line "RE: From Dick Merrill to an outside attorney" to Musacchio.

47 On or about January 21, 2006, Musacchio made unauthorized access to the Exel email servers and to the account of Exel's legal counsel. He then forwarded an email which had been sent by Exel's legal counsel to another and which discussed the possibility of Exel's phones being tapped. Musacchio then forwarded the email to Brown and discussed it in a series of emails. On January 21, 2006, Musacchio

emailed Brown and told him to "delete everything I sent you I am now deleting everything you and I correspond [sic] as soon as I read it."

48. On or about February 3, 2006, Musacchio emailed Brown with the subject line "Levi sent email info to Damman DELETE AFTER READING."

49. On or about February 23, 2006, Brown made an unauthorized access to the Exel email servers and to the email account of Exel's president. After making the unauthorized access, Brown forwarded to Musacchio a confidential email between Exel's president and a person known to the grand jury which had been sent by the president on or about February 22, 2006 with the subject "Re: Confidential PepsiCo/Frito Lay " Musacchio responded to Brown at his email account at bellsouth.net from Musacchio's email account at TTS.

50. On or about February 23, 2006, Brown made an unauthorized access to the Exel email server and to the email account of Exel's president. After making the unauthorized access, Brown forwarded a confidential email between Exel's president and Exel's vice president which had been sent by the president on or about February 22, 2006 with the subject "RE: Thanks" to Musacchio. Musacchio responded to Brown at his email account at bellsouth.net from Musacchio's email account at TTS.

51. On or about February 23, 2006, Brown made an, unauthorized access to the Exel mail server and to the email account of an Exel employee. After making the unauthorized access, Brown forwarded a confideniial email string between Exel's president and another Exel employee known to the grand jury

to Musacchio with the subject line "Long.....but good." Musacchio used his email account at TTS, and replied to Brown at Brown's email address at bellsouth.net and included the message "This is a good one! Looks like we are in good shape. Sent From Blackberry Handheld, Please Excuse Typos."

52. On or about February 23, 2006, Brown made an unauthorized access to the Exel mail server and to the email account of Exel's president. After making the unauthorized access, Brown forwarded a confidential email which was copied to the president and others known to the grand jury to Musacchio with the subject line "He sounds pist! [sic]." Musacchio replied from his email account at tts-us.com to Brown at his email account at bellsouth.net with the message "Maybe time to call him?..."

53. On or about February 23, 2006, Brown made an unauthorized access to the Exel mail server and to the email account of an Exel employee. After making the unauthorized access, Brown forwarded a confidential email between Exel's president and another person known to the grand jury which had the subject line "Re: American Suzuki." The content of the email discussed the loss of an account for American Suzuki to Musacchio. Musacchio used his email account at TTS and replied to Brown via email at his bellsouth.net with the statement "Well, now they know ...."

54. On or about February 23, 2006, Brown made an unauthorized access to the Exel email server and to the account of Exel's president. After making the unauthorized access, Brown forwarded a copy of a confidential email between Exel's president and a

person known to the grand jury which had a subject line "Key People," and which discussed providing an incentive to prevent losing key personnel to Musacchio. Musacchio used his TTS email account to reply to Brown at his bellsouth.net account with the message: "Throw more money after something we are not after!..."

55. On or about February 24, 2006, Brown made an unauthorized access to the Exel email servers and to the account of Exel's vice president. After making the unauthorized access, Brown forwarded a confidential email to Musacchio. The confidential email was between the vice president and another person known to the grand jury which had been sent by the vice president on or about that date with the subject line "Letter going to West Farm." Musacchio replied to Brown at his bellsouth.net on the same date from his email account at tts-us.com. In an exchange of emails, Musacchio responded to Brown "...We cannot do anything unwise at this time."

56. On or about February 25, 2006, Brown made an unauthorized access to the Exel email servers and to the email account of an Exel employee and obtained an email that Exel's president and another Exel employee had received on that date from the vice president. The email to the president contained the subject line "FW: update information on the action items of the day." After making the unauthorized access, Brown forwarded a copy of the email to Musacchio with a blank subject line. Musacchio replied to Brown's email account at Brown's bellsouth.net account from his email account at tts-us.com.

57 On or about March 7, 2006, Brown made an unauthorized access to the Exel email servers and to the email account of Legal Counsel for Exel. Brown used his email account at bellsouth.net, and forwarded to Musacchio at his TTS email account, correspondence from Exel Legal Counsel to another person known to the grand jury with subject line "RE: Personal Computer Chain of Custody" which described Exel's internal investigation into data breaches at Exel, including the unauthorized destruction of data by Brown and unauthorized removal of equipment by Kelly.

58. On or about March 16, 2006, Brown made unauthorized access to Exel email servers, after which he sent Musacchio a copy of a confidential internal Exel email, with the subject line "Remember to completely delete" and the email sensitivity as "Private." The email was responded to by Musacchio from an email account assigned to him by TTS, and was sent to an email account assigned to Brown by TIS. Musacchio's response was "Well! We are getting into better and better position! Thank you for getting this info."

59. On or about March 17, 2006, Brown made an unauthorized access to the Exel email servers and to the account of Exel's president, and obtained Exel's proprietary information contained in internal emails between Exel's president and a person known to the grand jury. On or about March 18, 2006, Musacchio and Brown exchanged emails with the subject line "Re: Very long but very good information" in which they debated the merits of an email chain between

Exel employees which discussed an important Exel client.

60. On or about March 18, 2006, Brown made unauthorized access to the Exel email server and to the account of Exel's president. Brown sent a copy of emails between the president and others known to the grand jury to Musacchio from his email account at bellsouth.net with the subject line "Dan is outa there!" Musacchio replied to Brown's email from his email account at TTS.

61. On or about March 24, 2006, in an email string between Musacchio and Brown, Musacchio instructed Brown "if you go fishing, please look for anything about Mitsubishi quotes by someone." Brown replied "I am fishing right now actually. Lisa and Julie disappeared from the meeting and Todd thinks they are over at our office...." Musacchio responded "they are." Later that day. Brown emailed Musacchio with the subject line "Bad News" and informed him "it appears my fishing hole has dried up ... no more fishing." **Musacchio** responded "Why?"

All in violation of 18 U.S.C. § 371 (conspiracy to violate 18 U.S.C. §§1030(a)(2)(C);(c)(2)(B)(i)-(iii) (unauthorized access and exceeding authorized access to protected computer)).

Counts 2 22

Exceeding Authorized Access to Protected Computers

(Violation of 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i)-(iii) and 1030(b))

Aiding and Abetting

(Violation of 18 U.S.C. § 2)

1. The grand jury hereby realleges and incorporates the allegations set out in paragraphs 1-8 of the Introduction and Count 1 of the Indictment.

2. On or about the dates indicated below, for each count below, in the Dallas Division of the Northern District of Texas and elsewhere, defendant, Joseph Taylor (Roy) Brown, aided and abetted by defendant John Michael Kelly, did knowingly and intentionally access without authorization, and attempted to access without authorization, a protected computer as defined at 18 U.S.C. § 1030(e)(2)(B), specifically, to intentionally access a computer without authorization, and thereby obtain information, and the offense was committed for purposes of commercial advantage and private financial gain and in furtherance of a criminal and tortious act in violation of the U S. Constitution or laws of the United States or of any state, including the State of Texas, and the value of the information obtained exceeded $5,000, in violation of 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i)-(iii), and as a direct result accessed emails and attached documents contained in the email accounts of Exel officers and employees, as described below:

COUNT	DATE	EXEL EMAIL ACCOUNT(S)
2	11/07/2005	Exel's President
3	11/08/2005	Exel's President
4	11/09/2005	Exel's President
5	01/06/2006	Exel's President
6	01/08/2006	Exel's President

7	01/18/2006	Exel's President
8	01/20/2006	Exel Server
9	01/21/2006	Exel's Legal Counsel
10	02/23/2006	Exel's President
11	02/23/2006	Exel's President
12	02/23/2006	Exel's President
13	02/23/2006	Exel's President
14	02/23/2006	Exel's President
15	02/23/2006	Exel's President
16	02/24/2006	Exel's Vice-President
17	02/25/2006	Exel Server
18	03/07/2006	Exel's Legal Counsel
19	03/16/2006	Exel Server
20	03/17/2006	Exel's President
21	03/18/2006	Exel's President
22	03/18/2006	Exel's Vice-President

All in violation of 18 U.S.C. §§ 1030(a)(2)(C); (c)(2)(B)(i)-(iii) and 2.

Counts 23 - 24

Unauthorized Access to Protected Computers

(Violation of 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i)-(iii))

1. The grand jury hereby realleges and incorporates the allegations set out in paragraphs 1- 8 of the Introduction and Count 1 of the Indictment.

2. On or about the dates indicated below, for each count below, in the Dallas Division of the Northern District of Texas and elsewhere, defendant, Michael Musacchio, did knowingly and intentionally access

without authorization, and attempted to access without authorization, an Exel protected computer, as defined at 18 U.S.C. § 1030(e)(2)(B), specifically, to intentionally access a computer without authorization, and thereby obtain information, and the offense was committed for purposes of commercial advantage and private financial gain and in furtherance of a criminal and tortious act in violation of the Constitution or laws of the United States or of any state, including the State of Texas, and the value of the information obtained exceeded $5,000, in violation of 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i)-(iii), and as a direct result accessed emails and attached documents contained in the email accounts of Exel officers and employees, as described below:

COUNT	DATE	EXEL EMAIL ACCOUNT(S)
23	11/24/2005	Exel Server
24	01/21/2006	Exel's Legal Counsel

All in violation of 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i)-(iii).

A TRUE BILL
s/ [illegible signature]
FOREPERSON

JAMES T. JACKS
UNITED STATES ATTORNEY
By:
s/ Linda Groves
LINDA C. GROVES

Assistant United States Attorney
Texas Bar No. 08553100
1100 Commerce Street, Third Floor
Dallas, Texas 75242
Telephone: 214.659.8600
Facsimile: 214.761.2846
Linda.Groves@usdoj.gov

MONA SEDKY
Trial Attorney
Computer Crime Intellectual Property Section
U. S. Department of Justice
Washington, D.C. 20005
Phone (202) 353-4304
Fax (202) 514-6113
Mona.Sedky@usdoj.gov

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

v.

MICHAEL MUSACCHIO (1)
JOSEPH TAYLOR (ROY) BROWN (2)
JOHN MICHAEL KELLY (3)

INDICTMENT

18 U.S.C. § 371 and (18 U.S.C. § 1030(a)(2)(C); (c)(2)(B)(i)-(iii»

Conspiracy to Make Unauthorized Access to Protected Computer

and to Exceed Authorized Access to Protected Computer

18 U.S.C. §§ 1030(a)(2)(C); (c)(2)(B)(i)-(iii) andI030(b)

Exceeding Authorized Access to Protected Computers

18 U.S.C. § 2

Aiding and Abetting

18 U.S.C. §§ 1030(a)(2)(C); (c)(2)(B)(i)-(iii)

Unauthorized Access to Protected Computers

24 Counts

A true bill rendered:

s/ [illegible signature]

DALLAS FOREPERSON

Filed in open court this 2nd day of November, A.D. 2010.

Clerk

WARRANT TO ISSUE AS TO DEFENDANTS: MICHAEL MUSACCHIO, JOSEPH TAYLOR (ROY) BROWN and JOHN MICHAEL KELLY

UNITED STATES DISTRICT/MAGISTRATE JUDGE

Magistrate Case Number Pending: 3:08-MJ-135 (Search Warrant)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

1. Defendant Information

Juvenile:

If Yes, Matter to be sealed:

☐Yes ☒No

Related Case Information

Superseding Indictment: ☐Yes ☒No New Defendant: ☒Yes ☐No

Pending CR Case in NDTX: ☐Yes ☒No If Yes, number:

Search Warrant Case Number: 3:08-MJ-1358

R 20 from District of _____

Magistrate Case Number: N/A

Defendant Name MICHAEL MUSACCHIO (1)

Alias Name _____

Address _____

County in which offense was committed: Dallas, Texas

2. U.S. Attorney Information 3-10CR0308-P
AUSA LINDA C. GROVES Texas Bar No. 08553100

3. Interpreter
☐Yes ☒No If Yes, list language and/or dialect: _____

4. Location Status WARRANT TO ISSUE
Arrest Date
☐ Already in Federal Custody
☐ Already in State Custody
☐On Pretrial Release

5. U.S.C. Citations
Total # of Counts as to This Defendant: ☐ Petty ☐ Misdemeanor ☒ Felony

Citation	**Description of Offense Charged Count(s)**
18 U.S.C. § 371 and (18 U,S.C. § 1030(a)(2)(C); (c)(2)(B)(i)-(iii))	Conspiracy to Make Unauthorized Access 1 to Protected Computer and to Exceed
18 U.S.C. §§ 1030(a)(2)(C); (c)(2)(B)(i)-(iii)	Authorized Access to Protected Computer Unauthorized Access to Protected Computers 23-24

Date: November 1, 2010 Signature of AUSA: _____

UNITED STATES DISTRICT COURT
- NORTHERN DISTRICT OF TEXAS

1. Defendant Information

Juvenile:

If Yes, Matter to be sealed:

☐Yes ☒No

Related Case Information

Superseding Indictment: ☐Yes ☒No New Defendant: ☒Yes ☐No

Pending CR Case in NDTX: ☐Yes ☒No If Yes, number:

Search Warrant Case Number: 3:08-MJ-1358

R 20 from District of _____

Magistrate Case Number: N/A

Defendant Name JOSEPH TAYLOR (ROY) BROWN (2)

Alias Name _____

Address _____

County in which offense was committed: Dallas, Texas

2. U.S. Attorney Information 3-10CR0308-P

AUSA LINDA C. GROVES Texas Bar No. 08553100

3. Interpreter

☐Yes ☒No If Yes, list language and/or dialect: _____

4. Location Status WARRANT TO ISSUE

Arrest Date -

☐ Already in Federal Custody
☐ Already in State Custody

☐On Pretrial Release

5. U.S.C. Citations

Total # of Counts as to This Defendant: ☐ Petty ☐ Misdemeanor ☒ Felony

Citation	Description of Offense Charged Count(s)
18 U.S.C. § 371 and (18 U,S.C. § 1030(a)(2)(C); (c)(2)(B)(i)-(iii))	Conspiracy to Make Unauthorized Access 1 to Protected Computer and to Exceed
18 U.S.C. §§ 1030(a)(2)(C); (c)(2)(B)(i)-(iii)	Authorized Access to Protected Computer Unauthorized Access to Protected Computers 23-24
Date: November 1, 2010	Signature of AUSA: _____

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

1. Defendant Information

Juvenile:

If Yes, Matter to be sealed:

☐Yes ☒No

Related Case Information

Superseding Indictment: ☐Yes ☒No New Defendant: ☒Yes ☐No

Pending CR Case in NDTX: ☐Yes ☒No If Yes, number:

Search Warrant Case Number: 3:08-MJ-1358

R 20 from District of

Magistrate Case Number: N/A

Defendant Name JOHN MICHAEL KELLY (3)

Alias Name

Address

County in which offense was committed: Dallas, Texas

2. U.S. Attorney Information 3-10CR0308-P

AUSA LINDA C. GROVES Texas Bar No. 08553100

3. Interpreter

☐Yes ☒No If Yes, list language and/or dialect:

4. Location Status WARRANT TO ISSUE

Arrest Date -

☐ Already in Federal Custody
☐ Already in State Custody
☐On Pretrial Release

5. U.S.C. Citations

Total # of Counts as to This Defendant: ☐ Petty ☐ Misdemeanor ☒ Felony

Citation	**Description of Offense Charged Count(s)**
18 U.S.C. § 371 and (18 U,S.C. § 1030(a)(2)(C); (c)(2)(B)(i)-(iii))	Conspiracy to Make Unauthorized Access 1 to Protected Computer

18 U.S.C. 1030(a)(2)(C); (c)(2)(B)(i)-(iii)	§§	and to Exceed Authorized Access to Protected Computer Unauthorized Access to Protected Computers 23-24
Date: November 1, 2010		Signature of AUSA: _____

SUPERSEDING INDICTMENT, SEPT. 6, 2012 [EXCERPT]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES	§	
OF AMERICA	§	
	§	No. 3:10-CR-00308-P
v.	§	
	§	**(Supersedes**
MICHAEL	§	**indictment returned**
MUSACCHIO (1)	§	**on November 2, 2010)**
	§	
	§	

* * *

[pages 4-6]

Count One

Conspiracy To Make Unauthorized Access to Protected Computer (Violation of 18 U.S.C. § 371 (conspiracy to violate 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i) and (iii)(unauthorized access))

1. The Grand Jury realleges and incorporates the allegations of paragraphs 1-8 of the Introduction to the Indictment.

Object of the Conspiracy

2. From at least in or about April 2004, and continuing through in or about March 2006, in the Dallas Division of the Northern District of Texas, and elsewhere, defendant **Michael Musacchio,** did unlawfully, willfully, and knowingly combine, conspire, confederate and agree with Joseph Roy Brown and Michael Joseph Kelly, and with other persons known and unknown to the Grand Jury to commit offenses against the United States, specifically, to intentionally access a computer without authorization and exceed authorized access to a protected computer, as defined at 18 U.S.C. § 1030(e)(2)(B), and thereby obtain information, and the offense was committed for purposes of commercial advantage and private financial gain, and the value of the information obtained exceeded $5,000, in violation of 18 U.S.C. § 371 (conspiracy to violate 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i) and (iii) (unauthorized access to a protected computer)).

Manner and Means

A. **Musacchio** and Brown made unauthorized accesses and exceeded authorized access to Exel's protected computers including the Exel mail server from their personal internet accounts, their assigned user accounts at the offices of TTS, and the administrator accounts at Exel, and obtained Exel emails, email attachments, and other business documents containing Exel's confidential and proprietary information. They did so to provide a commercial advantage and private financial gain to TTS, themselves, Kelly, and the unindicted coconspirators.

B. **Musacchio** and Brown obtained administrative passwords and login information to Exel's protected computers from Kelly and made unauthorized accesses and exceeded any authorized access to Exel's protected computers. They did so to provide a commercial advantage and private financial gain to TTS, themselves, Kelly and the unindicted coconspirators.

C. **Musacchio** directed unindicted coconspirators, who were employed by Exel during the time of the conspiracy, to exceed any authorized access to Exel's protected computers, and to obtain Exel's emails, email attachments, and other business documents containing Exel's confidential and proprietary information. He did so to provide a commercial advantage and private financial gain to himself, TTS, Brown, Kelly and the unindicted coconspirators.

D. Brown made unauthorized accesses to and exceeded his authorized access to Exel's protected computers and obtained Exel's emails, email attachments, and other business documents containing Exel's confidential and proprietary information. Brown frequently forwarded Exel's confidential, proprietary emails and documents to **Musacchio** and other unindicted coconspirators. He did so to provide a commercial advantage and private financial gain to himself, TTS, **Musacchio**, Kelly and the unindicted coconspirators.

* * *

32. Beginning on or about November 23, 2005, and continuing through on or about February 12, 2006, user accounts belonging to Musacchio including his TTS user account were used to log onto Exel's email servers without authorization, and to make approxi-

mately 3,000 unauthorized accesses to emails and attachments belonging to Exel employees.

33. On or about November 24, 2005, Musacchio emailed Brown from his TTS email account to inform Brown that the Exel web mail server was down and he could not access the email accounts of Exel employees. Musacchio's message read: "When you get a chance, try to get onto ETS's Webmail. Everything was fine last night, but tonight I get an error message that says 'Failed to Connect to Mail Server.' I didn't do anything that would lock me out. Maybe the server is down?" On November 25, 2005, Brown replied to Musacchio from his TTS email account that: "Looks like the server is down.....guess we will have to wait until someone figures that out." Musacchio replied: "ok, thanks." Later Brown emailed Musacchio that he had restarted Exel's email server remotely and said "It's working now.....I restarted it remotely.....I guess they have not changed a single password!"

* * *

[page 23]

* * *

Counts 2-3

Unauthorized Access to Protected Computers

(Violation of 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i) and (iii))

1. The grand jury hereby realleges and incorporates the allegations set out in paragraphs 1 8 of the Introduction and Count 1 of the Indictment.

2. On or about the dates indicated below, for each count below, in the Dallas Division of the Northern District of Texas and elsewhere, defendant, **Michael Musacchio**, did knowingly and intentionally access without authorization, and attempted to access without authorization, an Exel protected computer, as defined at 18 U.S.C. § 1030(e)(2)(B), specifically, to intentionally access a computer without authorization, and thereby obtain information, and the offense was committed for purposes of commercial advantage and private financial gain, and the value of the information obtained exceeded $5,000, in violation of 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i) and (iii), and as a direct result accessed emails and attached documents contained in the email accounts of Exel officers and employees, as described below:

COUNT	DATE	EXEL EMAIL ACCOUNT(S)
2	11/23-25/2005	Exel email accounts of Exel President and Excel legal counsel
3	01/21/2006	Exel's Legal Counsel

All in violation of 18 U.S.C. §§1030(a)(2)(C); (c)(2)(B)(i) and (iii).

* * *

GOVERNMENT'S PROPOSED JURY INSTRUCTIONS, SEPT. 7, 2012 [EXCERPTS]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES	§	
OF AMERICA	§	
	§	
V	§	CRIMINAL NO.
	§	3:10-CR-00308-P
	§	(ECF)
MICHAEL MUSACCHIO (1)	§	
	§	

GOVERNMENT'S PROPOSED JURY
INSTRUCTIONS

The United States of America submits the attached proposed Jury Instructions. Pursuant to Rule 30 of the Fed. R. Crim. P., respectfully requests the Court to include the attached instructions in its charge to the jury, and requests leave to offer such other and additional instructions as may become appropriate during the course of the trial.

The requested jury instructions deal with the essential elements of the crimes charged in the indictment and certain matters of evidence for which the Court might require instructions to the jury. The Government assumes that the Court's charge con-

cerning general matters will be charged by the Court in terms similar to those usually employed by the Court.

* * *

GOVERNMENT REQUESTED INSTRUCTION
NO. 14

CONSPIRACY

Count One of the Superseding Indictment charges:

[Please read Count One]

The defendant, MICHAEL MUSACCHIO, is charged with conspiring to commit Unauthorized Access to Protected Computers in Count One of the Superseding Indictment. The object of the conspiracy, Unauthorized Access to Protected Computer(s), is charged in Counts Two and Three of the Superseding Indictment and I will instruct you as to the elements of that crime later in my instructions.

A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of "partnership in crime" in which each member becomes the agent of every other member.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant and at least one other person made an agreement to commit the crime of Unauthorized Access to Protected Computer(s) as charged in the Superseding Indictment;

Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose; and

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the Superseding Indictment, in order to accomplish some object or purpose of the conspiracy.

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all of the details of the scheme alleged in the superseding indictment were actually agreed upon or carried out. Nor must it prove that all of the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of a conspiracy, does not thereby become a conspirator.[13]

* * *

---

[13] Fifth Circuit Criminal Jury Instructions, 2001, § 2.20 [modified].

SECOND SUPERSEDING INDICTMENT, JAN. 8, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES	§	
OF AMERICA	§	
	§	No. 3:10-CR-00308-P
v.	§	
	§	**(Supersedes**
MICHAEL	§	**indictments returned**
MUSACCHIO (1)	§	**on November 2, 2010**
	§	**and September 6,**
	§	**2012)**

SECOND SUPERSEDING INDICTMENT

The Grand Jury Charges:

Introduction

At all times material to this indictment:

1. Exel Transportation Services, Inc. (Exel), formerly known as Mark VII Transportation Co., Inc. (Mark VII), had offices in Addison, Texas, Memphis, Tennessee, and elsewhere, and conducted business in the Northern District of Texas, Dallas Division, and elsewhere.

2. Total Transportation Services LLC conducted business in the Northern District of Texas, Dallas Di-

vision, and elsewhere as Worldwide Total Transportation Services GP LLC and was the general partner of the entity operated as Total Transportation Services LP doing business as Worldwide Total Transportation Services LP Total Transportation Services LLC and Total Transportation Services LP operated as Total Transportation Services (TTS). TTS was formed in or about November 2005.

3. TTS and Exel were competitors. Exel was a third party logistics company or intermodal marketing company which provided transportation and supply chain management products and services that facilitated the links between shippers and common carriers in the manufacturing, retail and consumer industries. Exel entered into contracts with independent agents and independent sales agents. Through these contractual arrangements and the utilization of in-house sales agents, Exel connected shipping customers with appropriate carriers and provided products, services and technology to assist its customers to transport goods. TTS, as Exel's competitor, was also a third party logistics company which offered similar types of business services and products, and utilized similar types of contracts with independent agents and independent sales agents.

4. Michael Musacchio, from in or about 1992, and continuing through on or about September 9,2004, was employed by Exel and its predecessor Mark VII in high level supervisory, management and officer positions. From in or about 2000, through in or about September 9, 2004, Musacchio was the President and Chief Executive Officer (CEO) of Exel. Musacchio left his position with Exel on or about September 9, 2004.

From in or about November 2005, through in or about April 2006, Musacchio was employed by TTS as the President and CEO. Musacchio was one of the initial Directors on the Board of Directors of TTS and held equity ownership in TTS.

5. Joseph Roy Brown, also known as Roy Brown, worked for Exel and its predecessor Mark VII from in or about August 1999, until in or about October 2005. At the time Brown left Exel, Brown's position was Vice President of Agency Support. Brown agreed to accept a position with TTS in or about October 2005, as the Vice President for Information Technology. From in or about October 2005, through in or about April 2006, Brown was employed by TTS.

6. John Michael Kelly worked for Exel from on or about October 2, 2000, until his resignation on or about October 27, 2005. At the time of his resignation, Kelly worked as the Senior Network Engineer for Exel. As an information technology specialist or network administrator, Kelly had administrator level access to all of the networked computers and internal email systems at Exel, including administrator-level access to Exel's computer network. After leaving Exel, until on or about October 27, 2010, Kelly was employed as Manager IT-Infrastructure for TTS.

7. At all times relevant to this indictment, Exel's computers which were used to access the email for Exel were located in both the Northern District of Texas, and Memphis, Tennessee. In addition, Musacchio, Brown and Kelly, while employed by Exel, performed work at the Exel offices in Addison, Texas. Musacchio was bound by non-compete and non-solicitation agreements while employed by Exel

and until on or about January 18, 2005, after leaving Exel.

8. Unindicted coconspirators KS, RE, JV and SB were employees of Exel. KS, JV and RE became employees of TTS after Musacchio and Brown left Exel. Unindicted coconspirators DL and HO were financiers.

Count One

Conspiracy To Make Unauthorized Access to Protected Computer (Violation of 18 U.S.C. § 371 (conspiracy to violate 18 U.S.C. §§1030(a)(2)(c); (c)(2)(B)(i) and (iii)(unauthorized access))

1. The Grand Jury realleges and incorporates the allegations of paragraphs 1-8 of the Introduction to the Indictment.

Object of the Conspiracy

2. From at least in or about April 2004, and continuing through in or about March 2006, in the Dallas Division of the Northern District of Texas, and elsewhere, defendant Michael Musacchio, did unlawfully, willfully, and knowingly combine, conspire, confederate and agree with Joseph Roy Brown and Michael Joseph Kelly, and with other persons known and unknown to the Grand Jury to commit offenses against the United States, specifically, to intentionally access a computer without authorization and exceed authorized access to a protected computer, as defined at 18 U.S.C. § 1030(e)(2)(B), and thereby obtain information, and the offense was committed for purposes of commercial advantage and private financial gain, and the value of the information obtained ex-

ceeded $5,000, in violation of 18 U.S.C. § 371 (conspiracy to violate 18 U.S.C. §§1030(a)(2)(c); (c)(2)(B)(i) and (iii) (unauthorized access to a protected computer)).

Manner and Means

A. Musacchio and Brown made unauthorized accesses and exceeded authorized access to Exel's protected computers including the Exel mail server from their personal internet accounts, their assigned user accounts at the offices of TTS, and the administrator accounts at Exel, and obtained Exel emails, email attachments, and other business documents containing Exel's confidential and proprietary information. They did so to provide a commercial advantage and private financial gain to TTS, themselves, Kelly, and the unindicted coconspirators.

B. Musacchio and Brown obtained administrative passwords and login information to Exel's protected computers from Kelly and made unauthorized accesses and exceeded any authorized access to Exel's protected computers. They did so to provide a commercial advantage and private financial gain to TTS, themselves, Kelly and the unindicted coconspirators.

C. Musacchio directed unindicted coconspirators, who were employed by Exel during the time of the conspiracy, to exceed any authorized access to Exel's protected computers, and to obtain Exel's emails, email attachments, and other business documents containing Exel's confidential and proprietary information. He did so to provide a commercial advantage and private financial gain to himself, TTS, Brown, Kelly and the unindicted coconspirators.

D. Brown made unauthorized accesses to and exceeded his authorized access to Exel's protected computers and obtained Exel's emails, email attachments, and other business documents containing Exel's confidential and proprietary information. Brown frequently forwarded Exel's confidential, proprietary emails and documents to Musacchio and other unindicted coconspirators. He did so to provide a commercial advantage and private financial gain to himself, TTS, Musacchio, Kelly and the unindicted coconspirators.

E. Brown obtained administrative passwords and login information to Exel's protected computers from Kelly and provided the passwords and login information to Musacchio to enable him to make unauthorized accesses to the protected computers of Exel and to defraud Exel of its proprietary information and business documents for the benefit of Musacchio, Brown, Kelly, the unindicted coconspirators and TTS.

F Kelly, while employed by Exel, instructed an Exel IT employee that he should not change the administrative passwords on the Exel computer servers even after Kelly and Brown left Exel or the computer system would crash. The retention of the same administrative passwords enabled continued unauthorized access to Exel's protected computers after Kelly, Brown, and Musacchio left Exel's employment and became employees of TTS, Exel's competitor.

G. Kelly provided the Exel passwords and login information to Brown. Brown provided the Exel passwords and login information to Musacchio, to enable both Brown and Musacchio to make unauthorized accesses to the protected computers of Exel. He did so

to provide a commercial advantage and private financial gain to Musacchio, Brown, Kelly, the unindicted coconspirators, and TTS.

Overt Acts

In furtherance of the conspiracy and to achieve its objects, defendant Michael Musacchio, coconspirator Joseph Roy Brown, and coconspirator John Michael Kelly, committed and caused to be committed, among others, the following overt acts in the Northern District of Texas, and elsewhere:

2004-2005

1. In or about April 2004, Musacchio and unindicted coconspirators DL and HO, discussed the funding for the formation of a new company, later to be called TTS, which would compete with Exel in the transportation services industry. The participants agreed upon the initial management group of TTS. Unindicted coconspirators DL and HO knew that Musacchio was obtaining Exel's proprietary and confidential information for the benefit of TTS.

2. On or about September 7, 2004, Musacchio resigned from his position as president of Exel effective September 9, 2004. On or about September 7, 2004, Musacchio and Brown discussed how Musacchio could access Exel's protected computers without authorization after Musacchio left Exel's employment.

3. On or about September 30, 2004, Musacchio sent an email with attachment to unindicted coconspirators DL and HO from his personal comcast.net account with the message "here is the ETS 2005 budget plan." The attachment was the budget plan which was dated after Musacchio had left Exel.

4. On or about December 21, 2004, Brown exceeded his authorized access to the Exel's email server and to the email account of an Exel employee known to the grand jury. Brown used his Blackberry and sent information he had obtained from the Exel employee's account to Musacchio at Musacchio's comcast.net email account with the message: "Some email between Jim and Andrew.....Maybe ETS is for sale?"

5. On or about January 7, 2005, Brown exceeded authorized access to the Exel's email server and to the account of a person known to the grand jury. Brown used his bellsouth.net account to send information from that account to Musacchio at his comcast.net account with the subject line "You will enjoy this....." Musacchio replied by email to Brown "This is great stuff! Thanks."

6. On or about February 21, 2005, an Exel employee known to the grand jury sent an email to Musacchio in which he asked Musacchio not to send items to his Exel email account due to the "covertness of this operation."

7 On or about April 22, 2005, Brown, while working at Exel, exceeded his authorized access and accessed the Exel email accounts for Exel employees. Brown sent information containing Exel proprietary business plans to Musacchio at Musacchio's comcast.net account. Musacchio replied to Brown by return email and made the following request: "Roy, if you can keep watch for replies to this email or anything else related to it, that would be very helpful!" Brown responded "Doing my best."

8. On or about May 16, 2005, Musacchio and an independent agent met with other persons known to

the grand jury to discuss a revised business plan for a new business entity which would compete with Exel.

9. On or about August 23, 2005, Brown and Musacchio exchanged emails in which Brown provided Musacchio with some ofExel's proprietary agency information which he had obtained from Exel's email accounts by exceeding his authorized access to Exel's servers. Musacchio emailed Brown that "this will be helpful," then directed Brown to provide additional emails from the email account of Exel's president. Brown responded that it was possible for him to provide additional emails from that account and asked if there was specific information he should look for.

10. On or about August 29, 2005, Brown exceeded his authorized access and forwarded an email message sent from bill.reed@ets.exel.com to Brown at his Exel account. Brown forwarded this message to his home email account with bellsouth.net. Brown then forwarded the message from his home account to Musacchio at Musacchio's comcast.net account.

11. On or about September 1, 2005, Brown emailed Exel's proprietary information to Musacchio concerning the possible future acquisition of Exel. Musacchio responded to Brown that "This could not be better news," and Brown replied "...this...is going to fall right into our plan."

12. On or about September 20, 2005, Brown exceeded his authorized access to Exel's email server and to the account of the Exel president. He used his bellsouth.net account to send information from the president's Exel account concerning the president's board presentation with an attachment to Musacchio

at Musacchio's comcast.net account. Musacchio replied to Brown "you are the Man!"

13. On or about September 20, 2005, Brown exceeded his authorized access to Exel's email server and to the email account of Exel's president, and obtained a file "Phantom Stock Option programme.xls." He then used his bellsouth.net account to send the file to Musacchio at Musacchio's comcast.net account. Musacchio replied by email: "You are on fire! Take a look at Toad's email and see if he is sucking up to Jim!" Brown then responded: "he is about as much out of the loop as Steve. I have looked but to no great findings [sic]."

14. Beginning on or about September 20, 2005, and continuing through March 25, 2006, accounts assigned to Brown including his TTS user account used servers including the TTS servers to log onto the Exel servers. Brown exceeded his authorized access to Exel servers in this manner prior to leaving Exel on October 17, 2005, and acted without authorized access after that date. While logged on, Brown's accounts accessed the emails and attachments of Exel's president, vice president and other Exel employees more than 300 times.

15. On or about September 21, 2005, Brown exceeded his authorized access to the Exel's email server and to the email account of the Exel president. He used his bellsouth.net account to send information obtained from an email the Exel president sent to another employee's account to Musacchio at Musacchio's comcast.net account with the subject line "From Jim to Andrew." On that date Brown also exceeded authorized access to the Exel's email server, and used

his bellsouth.net account to send to Musacchio at Musacchio's comcast.net account an email with attachments concerning proposed corporate changes which was sent from the Exel president to "Andrew/Tony."

16. On or about October 10, 2005, Brown exceeded authorized access to Exel's email server. Brown sent an email from his bellsouth.net account containing information obtained from the Exel president's email account to Musacchio at Musacchio's comcast.net account with the subject line: "Interesting reading ....."

17. Later, on or about October 10, 2005, Musacchio replied to Brown's email: "This is great! ...as long as Exel has something else to focus on, it will keep us off of their radar screen! ....Isn't there a way (when the time is right for us to write and email as Brad to Jim and really make some bogus shit up for them to get excited about? [sic]" Brown responded "Yes and it sounds like fun ... that would really [expletive deleted] with their heads!" Musacchio then emailed to Brown "I would like to compose an email from Brad to Jim. Can we do it and not have it traced?" On or about October 11, 2005, Brown responded "Yes, of course."

18. On or about October 13, 2005, Brown exceeded his authorized access to Exel's email server and to the email account of Exel's president. Brown used his bellsouth.net account and sent information from the president's email account to Musacchio at Musacchio's comcast.net account with the subject line: "RE: You will enjoy this ....." Musacchio replied by email and wrote: "Thanks. Now the next question is, how are we going to get into email after you

leave?" Brown replied: "Not a problem.....! have the back door password that only I know and no one else can change." Musacchio emailed back to Brown "beauty!"

19. On or about October 14, 2005, Musacchio emailed Brown from his comcast.net account with the subject line "Follow Up," and directed Brown to "Please keep looking in Brad's email to see if there id [sic] any information being passed to him from Frito-Lay about a meeting 1 will be having with them. Thanks."

20. On or about October 26,2005, Brown sent Musacchio information obtained from an email from Exel Legal Counsel to Exel's president that Brown obtained by an unauthorized access to Exel's email server. The email to Musacchio had the subject line "from Dick to Jim."

21. On or about October 29, 2005, Musacchio emailed Brown and directed "When you are perusing Jim or Andrew's email, please look for monthly/weekly financials. Thanks." Brown replied by email "What month do you want? I have everything up until I left which is through September. October numbers will be next week."

22. Before Brown left Exel's employment, Kelly showed Brown how to access Exel's email system via the internet. Kelly showed Brown how to use an administrator level account to access Exel employees' individual email accounts.

23. On or about October 27, 2005, Musacchio forwarded an email to unindicted coconspirator DL which Brown had obtained without authorization from Exel servers. The email which Brown sent to

Musacchio, and Musacchio then forwarded, was from Exel counsel to the Exel president concerning the fact that no Federal Maritime Commission Application existed for Musacchio.

24. On or about November 1, 2005, Brown made unauthorized access to the Exel's email server and accessed the email account of the Exel president. He then used his bellsouth.net account to send information from an email in the president's email account to Musacchio at Musacchio's comcast.net account with the subject line: "How funny is this shit!"

25. On or about November 3, 2005, unindicted coconspirator KS used her Hotmail account and sent an email to Musacchio containing information about phone calls she had overheard Exel's president making at Exel's office. Musacchio thanked her and told her "this is good stuff." Musacchio then used his comcast.net email account to email Brown with the subject line "FW: Edie, and other misc. gossip." In the email Musacchio wrote: "Confidential to you, but stay close to Jim's email. This is going to get interesting! Please do not let KS know that I passed this to you! Thanks." Brown responded from his bellsouth.net email account and stated " I will get back in the email and see what all is taking place."

26. On or about November 7, 2005, Brown made unauthorized access to Exel's email server and accessed the email account of the Exel president. He then used his bellsouth.net account to send information obtained from an email in the president's account to Musacchio at Musacchio's comcast.net account with the subject line: "From Jim to Dan/Andrew/Tony." On or about November 8, 2005,

Musacchio sent the email he had received from Brown to unindicted coconspirator KS with the message, "You didn't see this. ok."

27 On or about November 8, 2005, Brown made an unauthorized access to Exel's email server and the account of Exel's president and sent information from that account to Musacchio's comcast.net account. The email information which Brown sent had the subject line "Talk between Jim and Dan." On or about November 9, 2005, Musacchio forwarded this email to his wife and admonished her not to say anything about what he was doing.

28. On or about November 9, 2005, Brown made an unauthorized access to Exel's email server and to the email account of Exel's president. Brown sent information obtained from an email in that account to Musacchio. The information included a copy of an email string between Exel's president and Exel's Legal Counsel which had in the subject line "Organizational Announcement" to Musacchio with his subject line "They have no idea!!!!!!!!" Musacchio forwarded Brown's email to his wife using his comcast.net account.

29. On or about November 11, 2005, Kelly began training an Exel employee to replace him. Kelly told the Exel employee how to maintain and operate the computer systems at Exel and cautioned him that changing the system passwords would likely cause the system to crash.

30. On or about November 20, 2004, Musacchio sent an email to unindicted coconspirator SB, an Exel employee, to thank him for sending Exel's proprietary "Salesperson Comparison" information to him and

asked SB whether he also had YTD figures for sales personnel. SB had sent the Exel proprietary information without authorization.

31. On or about November 21, 2005, Musacchio emailed unindicted coconspirator DL requesting a meeting to discuss a TTS Board of Directors' resolution that Musacchio believed was needed, based on information he had received from unindicted coconspirator RE, an Exel employee, concerning a directive he had received from the Exel President and CEO regarding agents.

32. Beginning on or about November 23, 2005, and continuing through on or about February 12, 2006. user accounts belonging to Musacchio including his TTS user account were used to log onto Exel's email servers without authorization, and to make approximately 3,000 unauthorized accesses to emails and attachments belonging to Exel employees.

33. On or about November 24, 2005, Musacchio emailed Brown from his TTS email account to inform Brown that the Exel web mail server was down and he could not access the email accounts of Exel employees. Musacchio's message read: "When you get a chance, try to get onto ETS's Webmail. Everything was fine last night, but tonight I get an error message that says 'Failed to Connect to Mail Server.' I didn't do anything that would lock me out. Maybe the server is down?" On November 25, 2005, Brown replied to Musacchio from his TTS email account that: "Looks like the server is down.....guess we will have to wait until someone figures that out." Musacchio replied: "ok, thanks." Later Brown emailed Musacchio that he had restarted Exel's email server remotely

and said "It's working now.....I restarted it remotely.....I guess they have not changed a single password!"

34. On or about November 26, 2005, Musacchio emailed other persons known to the grand jury, and attached a copy of a confidential Exel memo describing Exel's 2006 Agent Retention/Incentives for keeping agents.

35. On or about November 28, 2005, a person known to the grand jury emailed Musacchio and expressed his concern about the legal risks of sending and receiving Exel documents and stated, "We don't want to give Exel grounds for legal action."

2006

36. On or about January 6, 2006, Brown sent an email to Musacchio in which he wrote "Go into the "email" and look at the sent items for JD."

37 On or about January 6, 2006, an unauthorized access to Exel's email servers was made to the account of an Exel employee known to the grand jury, and then Musacchio sent Brown information concerning a hold on the checks of sales agents from the employee's email account.

38. On or about January 7, 2006, Musacchio sent an email to Brown, unindicted coconspirators KS, JV, and other persons known and unknown to the grand jury, in which he asked that they keep "confidential information" that he had provided to them a secret. Musacchio warned them that disclosure of the confidential information would "destroy other people's careers."

39. On or about October 21, 2005, Brown signed an employment offer letter accepting employment with TTS effective October 24, 2005.

40. On or about January 7, 2006, Musacchio sent an email to Brown with the subject line "ETS Email" and the message "Do you think we are locked out forever??"

41. On or about January 8, 2006, Brown sent Kelly an email stating "Hey my back door to you know where is locked out. Do you know another way in?" On or about January 8, 2006, Kelly replied to Brown via email with the user names and passwords for the "Exchangeservice," "BESAdmin," and "Delano.service" administrator-level accounts that enabled Brown to make unauthorized access to Exel's protected computers. Brown emailed Musacchio later with the subject line "Back door Success" and wrote "I AM IN!!!!!!!!!! Several hours later I can see again!"

42. On or about January 12, 2006, Musacchio emailed Brown with the subject line "Load Tech" and with a message that an Exel employee "found out we are using Load Tech." Brown replied by email "Do you know how?" Musacchio then emailed Brown the message "Email said someone told her." Brown emailed back to Musacchio "... I will look in her email tomorrow."

43. On or about January 17, 2006, **Musacchio** sent an email to Brown with a subject line "Go hunting." The message indicated that **Musacchio** wanted Brown to look at the email accounts of the Exel president, legal counsel, vice president and another officer. Brown responded that he was heading to dinner, but

that when he got to the apartment he would "... dig deep!"

44. On or about January 17, 2006, Brown made an unauthorized access to the Exel's email server and the account of the Exel president. Brown sent an email to Musacchio with the subject line "Unbelievable email between Jim and Dick.....they are paranoid!" to which he inserted information from an email exchange between the Exel president and Exel legal counsel.

45. On or about January 21, 2006, Brown and Musacchio had email exchanges and discussed the deletion of emails that Musacchio had sent to himself with attachments from "other places," and how emails sent by Musacchio to a person known to the grand jury could be deleted from that person's laptop.

46. On or about January 21, 2006, Musacchio made unauthorized access to Exel's email server and to the email account of Exel's counsel. He then sent an email to Brown which contained information taken from the email account. The information taken from Exel counsel's email to an outside attorney discussed the possibility of phones being compromised at Exel by their "competitors." Musacchio and Brown had an email exchange in which they discussed Exel counsel's email.

47 On January 21, 2006, Musacchio emailed Brown and told him to "delete everything I sent you I am now deleting everything you and I correspond [sic] as soon as I read it."

48. On or about February 3, 2006, Musacchio emailed Brown with the subject line "Levi sent email info to Damman - DELETE AFTER READING."

49. On or about February 23, 2006, Brown made an unauthorized access to Exel's email servers and to the email account of Exel's president. After making the unauthorized access, Brown sent Musacchio information concerning a confidential email between Exel's president and a person known to the grand jury which had been sent by the president on or about February 22,2006 with the subject "RE: Confidential PepsiCo/FritoLay." Musacchio responded to Brown at his email accountatbellsouth.net from Musacchio's email account at TTS.

50. On or about February 23, 2006, Brown made an unauthorized access to Exel's email server and to the email account of Exel's president. After making the unauthorized access, Brown sent information to Musacchio about a confidential email between Exel's president and Exel's vice president which had been sent by the president on or about February 22, 2006 with the subject "RE: Thanks." Musacchio responded to Brown at his email account at bellsouth.net from Musacchio's email account at TTS.

51. On or about February 23, 2006, Brown made an unauthorized access to Exel's email server and to the email account of an Exel employee. After making the unauthorized access, Brown sent information about a confidential email string between Exel's president and another Exel employee via email to Musacchio. Brown used the subject line "Re: Long ..... but good." Musacchio used his email account at TTS, and replied to Brown at Brown's email address at bellsouth.net and included the message "This is a good one! Looks like we are in good shape. Sent From Blackberry Handheld, Please Excuse Typos."

52. On or about February 23, 2006, Brown made an unauthorized access to Exel's email server and to the email account of Exel's president. After making the unauthorized access, Brown sent information from a confidential email which was copied to the president and others known to the grand jury to Musacchio at Musacchio's email account. Brown used the subject line "He sounds pist! [sic]." Musacchio replied from his email account at tts-us.com to Brown at his email account at bellsouth.net with the message "Maybe time to call him?..."

53. On or about February 23, 2006, Brown made an unauthorized access to Exel's email server and to the email account of an Exel employee. After making the unauthorized access, Brown sent information from a confidential email between Exel's president and another person known to the grand jury to Musacchio. The content of the Exel president's email discussed the loss of an account for American Suzuki, and the president's email had the subject line "Re: American Suzuki." Musacchio used his email account at TTS and replied to Brown via email at his bellsouth.net account with the statement "Well, now they know ...."

54. On or about February 23, 2006, Brown made an unauthorized access to Exel's email server and to the account of Exel's president. After making the unauthorized access, Brown sent information obtained from a confidential email between Exel's president and a person known to the grand jury to Musacchio. The president's email had a subject line "Key People," and contained a discussion about offering incentives to prevent losing key personnel. Musacchio used his

TTS email account to reply to Brown at his bellsouth.net account with the message: "Throw more money after something we are not after!... "

55. On or about February 24, 2006, Brown made an unauthorized access to Exel's email servers and to the account of Exel's vice president. After making the unauthorized access, Brown sent information he had obtained from a confidential email in the Exel vice president's email account to Musacchio via email. The confidential email between the vice president and another person known to the grand jury had been sent by the vice president with the subject line "Letter going to West Farm." Musacchio replied to Brown at his bellsouth.net account on the same date from his email account at ttsus.com. In an exchange of emails, Musacchio responded to Brown "... We cannot do anything unwise at this time."

56. On or about February 25, 2006, Brown made an unauthorized access to Exel's email servers and obtained information from an email that Exel's president and another Exel employee had received on that date from the vice president. The email to the president contained the subject line "FW· update information on the action items of the day." After making the unauthorized access, Brown sent information from the email to Musacchio with a blank subject line. Musacchio replied to Brown's email account at Brown's bellsouth.net account from his email accountattts-us.com.

57 On or about March 7, 2006, Brown made an unauthorized access to Exel's email servers and to the email account of Legal Counsel for Exel. Brown used his email account at bellsouth.net, and sent in-

formation from the Legal Counsel's email account to Musacchio at his TTS email account. The subject line on the email in the Legal Counsel's email account which Brown accessed was "RE: Personal Computer - Chain of Custody" which described Exel's internal investigation into data breaches at Exel, including the unauthorized destruction of data by Brown and unauthorized removal of equipment by Kelly.

58. On or about March 16, 2006, Brown made unauthorized access to Exel's email servers, after which he sent Musacchio via email information from a confidential internal Exel email. The email that Brown sent Musacchio had the subject line "Remember to completely delete" and the email sensitivity was indicated as "Private."

Brown's email was responded to by Musacchio from an email account assigned to him by TTS, and was sent to an email account assigned to Brown by TTS. Musacchio's response was "Well! We are getting into better and better position! Thank you for getting this info."

59. On or about March 17, 2006, Brown made an unauthorized access to Exel's email servers and to the account of Exel's president, and sent Exel proprietary information to Musacchio via email which Brown had obtained from internal emails between Exel's president and a person known to the grand jury. On or about March 18, 2006, Musacchio and Brown exchanged emails with the subject line "Re: Very long but very good information" in which they debated the merits of an email chain between Exel employees which discussed an important Exel client.

60. On or about March 17, 2006, Brown made unauthorized access to Exel's email server and to the account of Exel's president. Brown sent information he obtained from emails between the president and others known to the grand jury to Musacchio from his email account at bellsouth.net with the subject line "Dan is outa there!" Musacchio replied to Brown's email from his email account at TTS.

61. On or about March 24, 2006, in an email string between Musacchio and Brown, Musacchio instructed Brown "if you go fishing, please look for anything about Mitsubishi quotes by someone." Brown replied "I am fishing right now actually. Lisa and Julie disappeared from the meeting and Todd thinks they are over at out office...."

Musacchio responded "They are." Later that day, Brown emailed Musacchio with the subject line "Bad News" and informed him "It appears my fishing hole has dried up ... no more fishing." Musacchio responded "Why?"

All in violation of 18 U.S.C. § 371 (conspiracy to violate 18 U.S.C. §§1030(a)(2)(c); (c)(2)(B)(i) and (iii) (unauthorized access to protected computer)).

Counts 2-3

Unauthorized Access to Protected Computers

(Violation of 18 U.S.C. §§1030(a)(2)(c); (c)(2)(B)(i) and (iii))

1. The grand jury hereby realleges and incorporates the allegations set out in paragraphs 1- 8 of the Introduction and Count 1 of the Indictment.

2. On or about the dates indicated below, for each count below, in the Dallas Division of the Northern District of Texas and elsewhere, defendant, Michael Musacchio, did knowingly and intentionally access without authorization, and attempted to access without authorization, an Exel protected computer, as defined at 18 U.S.C. § 1030(e)(2)(B), specifically, to intentionally access a computer without authorization, and thereby obtain information, and the offense was committed for purposes of commercial advantage and private financial gain, and the value of the information obtained exceeded $5,000, in violation of 18 U.S.C. §§1030(a)(2)(c); (c)(2)(B)(i) and (iii), and as a direct result accessed emails and attached documents contained in the email accounts of Exel officers and employees, as described below:

COUNT	DATE	EXEL EMAIL ACCOUNT(S)
2	11/23-25/2005	Exel email accounts of Exel President and Exel legal counsel
3	01/21/2006	Exel's Legal Counsel

All in violation of 18 U.S.C. §§1030(a)(2)(c); (c)(2)(B)(i) and (iii).

A TRUE BILL

s/ [illegible signature]

FOREPERSON

SARAH R. SALDANA
UNITED STATES ATTORNEY
By:
s/ Linda Groves
LINDA C. GROVES
Assistant United States Attorney
Texas Bar No. 08553100
1100 Commerce Street, Third Floor
Dallas, Texas 75242
Telephone: 214.659.8600
Facsimile: 214.761.2846
Linda.Groves@usdoj.gov

RICHARD D. GREEN
Trial Attorney
Pennsylvania Bar No. 43758
Computer Crime Intellectual Property Section
U. S. Department of Justice
1301 New York Avenue NW, Suite 600
Washington, D.C. 20005
Tel. 202.616.3475
Fax 202.514.6113
Richard.Green@usdoj.gov

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE UNITED STATES OF AMERICA

v.

MICHAEL MUSACCHIO

SECOND SUPERSEDING INDICTMENT

18 USC § 371
Conspiracy to Make Unauthorized Access To Protected Computer

A true bill rendered

DALLAS

18 USC §§1030(a)(2)(C); (c)(2)(B)(i) and (iii)
Unauthorized Access to Protected Computers

3 Counts

Filed in open court this __ day of January 2013

Clerk

GOVERNMENT'S AMENDED JURY INSTRUCTIONS, FEB. 1, 2013 [EXCERPTS]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES	§	
OF AMERICA	§	
	§	
V	§	CRIMINAL NO.
	§	3:10-CR-00308-P
	§	(ECF)
MICHAEL MUSACCHIO (1)	§	
	§	

GOVERNMENT'S AMENDED JURY
INSTRUCTIONS

The United States of America submits the attached proposed Jury Instructions. Pursuant to Rule 30 of the Fed. R. Crim. P., respectfully requests the Court to include the attached instructions in its charge to the jury, and requests leave to offer such other and additional instructions as may become appropriate during the course of the trial.

The requested jury instructions deal with the essential elements of the crimes charged in the indictment and certain matters of evidence for which the Court might require instructions to the jury. The Government assumes that the Court's charge con-

cerning general matters will be charged by the Court in terms similar to those usually employed by the Court.

* * *

GOVERNMENT REQUESTED INSTRUCTION
NO. 14

CONSPIRACY

Count One of the Second Superseding Indictment charges:

[Please read Count One]

The defendant, MICHAEL MUSACCHIO, is charged with conspiring to commit Unauthorized Access to Protected Computers in Count One of the Second Superseding Indictment. The object of the conspiracy, Unauthorized Access to Protected Computer(s), is charged in Counts Two and Three of the Second Superseding Indictment and I will instruct you about this crime when I instruct you about Counts Two and Three. But for the purposes of the Conspiracy charge, the elements of the crime, Unauthorized Access to Protected Computer(s), are as follows:

First: The defendant, or another member of the conspiracy, intentionally accessed a protected computer(s) without authorization; and

Second: The defendant, or another member of the conspiracy, obtained information from that protected computer(s); and

Third: The conduct involved an interstate or foreign communication; and

Fourth: At least one of the following is also present:

1. The offense was committed for purposes of commercial advantage;

or

2. The offense was committed for purposes of private financial gain; or

3. The value of the information obtained exceeded $5,000.

A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of "partnership in crime" in which each member becomes the agent of every other member.

For you to find the defendant guilty of the crime of Conspiracy as charged in Count One of the Second Superseding Indictment, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant and at least one other person made an agreement to commit the crime of Unauthorized Access to Protected Computer(s) as charged in the Second Superseding Indictment;

Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose; and

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the Second Superseding Indictment, in order to accomplish some object or purpose of the conspiracy.

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all of the details of the scheme alleged in the Second Superseding indictment were actually agreed upon or carried out. Nor must it prove that all of the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which

advances some purpose of a conspiracy, does not thereby become a conspirator.[13]

* * *

[13] Fifth Circuit Criminal Jury Instructions, 2001. § 2.20 [modified].

GOVERNMENT'S SECOND AMENDED JURY INSTRUCTIONS, FEB. 26, 2013 [EXCERPTS]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES	§
OF AMERICA	§
	§
V.	§ CRIMINAL NO.
	§ 3:10-CR-00308-P
	§ (ECF)
MICHAEL MUSACCHIO (1)	§
	§

GOVERNMENT'S SECOND AMENDED JURY INSTRUCTIONS

The United States of America submits the attached proposed Jury Instructions pursuant to Rule 30 of the Fed. R. Crim. P., and respectfully requests the Court to include the attached instructions in its charge to the jury, and requests leave to offer such other and additional instructions as may become appropriate during the course of the trial.

The requested jury instructions deal with the essential elements of the crimes charged in the indictment and certain matters of evidence for which the Court might require instructions to the jury. The Government assumes that the Court's charge con-

cerning general matters will be charged by the Court in terms similar to those usually employed by the Court.

* * *

GOVERNMENT REQUESTED INSTRUCTION
NO. 14

CONSPIRACY

Count One of the Second Superseding Indictment charges:

[Please read Count One]

The defendant, MICHAEL MUSACCHIO, is charged with conspiring to commit Unauthorized Access to Protected Computers in Count One of the Second Superseding Indictment. The object of the conspiracy, Unauthorized Access to Protected Computer(s), is charged in Counts Two and Three of the Second Superseding Indictment and I will instruct you about this crime when I instruct you about Counts Two and Three. But for the purposes of the Conspiracy charge, the elements of the crime, Unauthorized Access to Protected Computer(s), are as follows:

First: The defendant, or another member of the conspiracy, intentionally accessed a protected computer(s) without authorization; and

Second: The defendant, or another member of the conspiracy, obtained information from that protected computer(s); and

Third: The conduct involved an interstate or foreign communication; and

Fourth: At least one of the following is also present:

1. The offense was committed for purposes of commercial advantage;

or

2. The offense was committed for purposes of private financial gain; or

3. The value of the information obtained exceeded $5,000.

"Computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device. (18 U.S.C. § 1030(e)(1)).

"Protected computer" means a computer which is used in interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communications or the United States. (18 U.S.C. § 1030(e)(2)(B)).

"Commercial advantage" includes not only monetary gain, but also an advantage over a competitor, including, but not limited to increased revenues, reduced business costs; and retention of customers, agents or employees.

"Financial gain" includes the receipt or expected receipt of anything of value.[13]

A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of "partnership in crime" in which each member becomes the agent of every other member.

For you to find the defendant guilty of the crime of Conspiracy as charged in Count One of the Second Superseding Indictment, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant and at least one other person made an agreement to commit the crime of Unauthorized Access to Protected Computer(s) as charged in the Second Superseding Indictment;

Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose; and

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the Second Superseding Indictment, in order to accomplish some object or purpose of the conspiracy.

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that

---

[13] Title 17 United States Code, Section 101

plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all of the details of the scheme alleged in the Second Superseding indictment were actually agreed upon or carried out. Nor must it prove that all of the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of a conspiracy, does not thereby become a conspirator.[14]

* * *

---

[14] Fifth Circuit Criminal Jury Instructions, 2001, § 2.20 [modified].

TRANSCRIPT VOL. 1, FEB. 19, 2013
[EXCERPTS]

[page 22, lines 18-25]

[THE COURT:]

* * *

The Defendant in this case is Michael Musacchio And I will introduce all the parties to you here in just a few minutes. He is charged in an indictment with one count of conspiracy to make unauthorized access to a protected computer, and with two counts of unauthorized access to a protected computer. The indictment alleges the dates of the offenses as beginning on or about April of 2004 and continuing at least to March of 2006.

* * *

[page 135, lines 8-21]

[THE COURT:]

* * *

First, the Defendant is presumed innocent until proven guilty. The indictment against the Defendant, brought by the Government, is only an accusation and nothing more. After the lunch break you will hear the indictment read. The indictment isn't evidence of guilt. It is an accusation. That is what brings the Defendant here. Don't rely in that in arriving at your verdict. You rely on that in terms of that sets out what the Government has to prove. But we will

include that in the Court's charge to the jury as well. We will set out for you things that we call elements of a crime, and those are the things that the Government has to prove beyond a reasonable doubt. The indictment itself or the fact of an indictment being returned is not any evidence that you should rely on in reaching your verdict in this case.

* * *

[page 141, lines 11 16]

* * *

THE COURT: Ms. Groves, who is reading the indictment?

MR. GREEN: I am, Your Honor.

THE COURT: Mr. Green, you may proceed.

MR. GREEN: May it please the Court.

(Whereupon, the indictment was read in open court.)

* * *

[page 144, line 8 to 153 line 17]

[MS. GROVES:]

* * *

The evidence will show, then, in September of 2005 when Musacchio announced that he was leaving, many of the people that he had cultivated at Exel--Ebinger, Vielhaber, Bowers, Brown--came to him wanting him to take them to his new company, but because of the non-solicitation and non-compete

agreements he told them he couldn't do it. Nonetheless, the evidence will show these individuals believed that that is exactly what Mike Musacchio was going to do, and he was going to set up a new company to compete with Exel and they wanted to be in it.

The evidence will show that these individuals were basically unindicted co-conspirators in this indictment; that they exceeded their authorized access at Exel and provided Musacchio with sensitive Exel business documents to ensure that when the time came that Musacchio could set up his competing business, that they would be included.

Why would they want to be included so badly? The evidence will show that this new competing company that Musacchio was to set up was going to provide the new group of Exel pioneers with an equity interest in the new company. And the new agents who were coming wanted to get an equity interest as well. So there was great interest in these individuals for two reasons. One, they wanted to get a competitive advantage for TTS, which would result in private financial gain to them. The same is true for Musacchio.

So in order to assure this in their future, they went about sending some things that they -- business documents, business records that they knew would be of value to Musacchio in setting up the new company to him; sometimes unsolicited, many times solicited.

These documents did help TTS. The evidence will show that TTS could not have started up nearly as quickly as it did without the benefit of Exel's inside information--Exel's budgets, their revenues, incentive programs, agent retention programs, even forms that Exel used were taken. There were thousands of doc-

uments that were taken from Exel by these individuals, exceeding authorized access, and also, the evidence will show, by the conspirators Roy Brown and Mike Musacchio making unauthorized accesses to Exel's computer systems and taking documents themselves.

Vielhaber was a vice president at Exel, and he was responsible for technology there. The evidence will show that Ebinger was a vice president in the financial aspects of Exel. He would provide business plans, sales and agency data, incentive programs, annual budgets. So would Bowers, who was a vice president at Exel.

Kim Shipp, who was the executive assistant, exceeded her authorized access also. She provided office gossip. She was the executive assistant for Jim Damman. She sat outside his office. She overheard his conversations, and she would email that information to Mike Musacchio.

The evidence will show Roy Brown when he was at Exel before he left he had a lot of responsibilities in the I.T. department. All of these individuals, the evidence will show, knew that they were not to send sensitive Exel business information outside the company without express authorization of the president.

Exel had a code of business conduct. They had a code of business ethics. They had email use policies in effect, and all of those documents, you will hear from a witness, Melissa McDonald in the HR department at Exel, all of those documents were in effect during the time period that is relevant during the indictment, and all of the individuals, both unindicted co-conspirators, Musacchio, Brown, and Kelly, knew

these documents, knew that they were supposed to comply with the restrictions on the use of Exel information that were set out in them.

While Brown was there after Musacchio left, he continued to exceed authorized access to Exel email servers. Brown left in October of 2005. Before Brown left, the evidence will show that Musacchio had gotten the assistance of a former director of Mark VII, Exel's predecessor, a man by the name of Doug List. You will hear from Doug List. He worked with Musacchio to get TTS up and running, to get its business plan going, to get its documents showing its estimates for revenues. These were important to attract investors to start up this company. And List used this information that had been provided by Brown, Vielhaber, Ebinger, Bowers, and that had been provided to Musacchio. He used it after Musacchio sent it to him. And the evidence will show that at some point even List became nervous about all of this bounty of Exel information coming in and cautioned Musacchio.

The evidence will show that Mike Kelly had worked at Exel in an I.T. capacity. He worked under Roy Brown's supervision. After Roy Brown left Exel, Mike Kelly stayed on for a bit longer. He left Exel in November of 2005. By November of 2005, Vielhaber, Shipp, and Brown had already left Exel and gone to work for TTS. TTS started up essentially as a functioning company in the fall of 2005.

After Roy Brown left Exel in October of 2005, the evidence will show that he then began making unauthorized accesses to Exel's computers, and he had taught Musacchio how to make those accesses also. In

fact, emails that you are going to see introduced into evidence in this case showed that Musacchio frequently directed Roy Brown to go fishing, which was a term used to say "Go to the emails; look for something of value." The evidence will show that Musacchio also referred to Roy Brown as 007, because essentially what Brown was doing at Musacchio's direction was spying on Exel.

As previously mentioned, the evidence will show that much of the Exel sensitive documentation was given to Douglas List and also given to Hal Oppenheimer who, at that time, was working with List for finding an investor.

Before TTS was up and running, when they were at the stage of gathering documentation, this new company Musacchio was forming was called Otra Vez. It later became Total Transportation Services.

The evidence will also show the vice president Steve Bowers sent many documents, many important documents to Musacchio by exceeding his authorized access. But he did not get invited to go to TTS, and he remained at Exel until he was terminated.

The evidence will further show that Roy Brown made his unauthorized accesses by using what is called the back door method. Roy Brown had administrator passwords to an Exel email server, an excel server called IXDOM.

The evidence will show that what Brown did was on his home computer he would log into his Bellsouth account. From there he would access the Exel email server, use an admin password to get in, he would scroll through the different email accounts, usually Jim Damman's email account, Richard Merrill the le-

gal counsel's email account, the email accounts for the vice presidents who were in charge of Exel's finances, any email account that Musacchio directed him to go look into, and any email account that he believed would help find information of value that he could pass along to Musacchio for the commercial advantage of TTS and the private financial gain of Musacchio and Brown and others.

The evidence will show that Roy Brown did have his Bellsouth account and he used it for making unauthorized accesses.

The evidence will also show that Musacchio had a Comcast account at his personal residence, and that in early January of 2006 he had a Verizon account at his personal residence.

The evidence will also show that Kim Shipp used a Hotmail account, and that a lot of the information was provided by Kim Shipp to Musacchio through her Hotmail account.

In the time period April 2004 through March 2006, the evidence will show that Brown made thousands of accesses to Exel email servers. Mr. Brown pled guilty. Mr. Brown will testify in this case. He will tell you what he did, what Musacchio did, what they did together to provide that commercial advantage to TTS and to get a private benefit.

At some point the evidence will show that Brown could no longer get into the Exel email servers using the IXDOM password. What he did then was he reached out to Mike Kelly who, at that point in time, no longer worked for Exel. He worked for TTS. You heard a reading of the indictment. You heard a reference to an email where Roy Brown said, "My you

know what to you know where is locked out." The evidence will show that Kelly, knowing that those administrative passwords were the keys to the kingdom of Exel's servers, responded back without question to Roy Brown with administrator passwords for other servers which were used by Brown to make unauthorized access.

Kelly also has pled guilty in this case, and he will testify about what he did. He will also testify about the set-up of Exel servers and also the set-up of Total Transportation Services.

You will also hear testimony from the vice presidents who exceeded their authorized access-- Vielhaber, Ebinger, and Bowers. Now, Mr. Ebinger remained with Exel until January of 2006 and continued during that time -- Remember, the evidence is going to show that Brown, Vielhaber, and Kelly had come over to Total Transportation Services in November of 2005. Ebinger was still there until January of 2006, still getting important financial information to Mike Musacchio for the benefit of Total Transportation Services for its commercial advantage.

When Ebinger came over to TTS in 2006, the evidence will show that Musacchio's coup was completed. They had also managed to get agents to come over, the agents with the big clients. The evidence will show that the Redden Group and the Yates Agency were with TTS by that point in time.

The evidence will show that Exel had attempted to prevent the departure of the agents that were important to their company, but by unauthorized accesses, Total Transportation knew everything that they were doing and were able to meet the demands

of the agents; were able to do something better to keep those agents with Total Transportation Services.

The evidence will show that Mike Musacchio crippled Exel, basically, through his efforts to create a competitor using unfair methods. The evidence will show that he crippled Exel by getting a commercial advantage for Total Transportation Services and by seeking private financial gain for himself and the others who were working with him.

The evidence in this case, the email evidence showing Musacchio's wrongdoing is overwhelming and pervasive. Thousands of sensitive business documents stolen; some stolen by Roy Brown and Musacchio through unauthorized accesses; some stolen by Roy Brown through exceeding unauthorized accesses; some stolen by other individuals at Exel by exceeding unauthorized accesses.

The evidence will show that Total Transportation Services made a very quick start, attracted investors very quickly, and generated tens of millions of dollars in one year while Exel lost millions in that same year.

You will hear the testimony of Exel's president Jim Damman, how he became suspicious, almost like somebody was looking over his shoulder, and how the firm Exel began to investigate whether someone was able to get access to their information. You will hear from Mr. Damman that they did find out that their email accounts had been compromised.

You will also hear from witnesses that Musacchio resigned from Total Transportation Services shortly after it was discovered that there were unauthorized accesses by him. You will also hear that Andy Cole,

who was associated with the Redden Group, became president of Total Transportation Services.

You will hear that Brown was terminated, Kelly was terminated, but some of the vice presidents who came over from Exel, who had exceeded their authorized access, remained with

Total Transportation Services, and remain there even today

The evidence will show from the testimony of Special Agent Allyn Lynd of the FBI that IP addresses of back door hacks were associated with Comcast, Bellsouth, and Verizon

email accounts through January of '06.

You will also hear From Agent Lynd that stolen emails that are set out in the indictment in this case were found on Exel computers, on conspirator home computers, and on Total Transportation systems, where they should not have been.

You will also hear testimony from Special Agent Lynd about attempts on the part of Brown and Musacchio to delete emails which would have indicated what they had actually done in this case.

At the conclusion of the evidence, ladies and gentlemen, the evidence will be overwhelming about what happened in this case. It will be overwhelming about the purpose for the unauthorized accesses and the accesses that exceeded authorization. They were done for the purpose of a competitive advantage of Total Transportation Services, and they were done for the purpose of private financial gain for Musacchio, Brown, and the others.

Thank you very much.

THE COURT: Thank you.

* * *

[page 168, line 12 to 169 line 2]

* * *

[JAMES JAY DAMMAN,

Testified on direct examination by Ms. Groves as follows:]

* * *

Q. At some point in time after it was discovered that there had been security breaches in the Exel email servers, was it discovered who was responsible for that?

A. Yes.

Q. And do you know who that was?

A. Mike Musacchio, Roy Brown.

Q. At any point in time did you learn that other Exel -- former Exel employees had made unauthorized accesses or exceeded -- I am sorry. Exceeded their authorized access to the Exel system and provided copies of proprietary information?

A. Yes.

Q. Do you know who those --

A. Steve Bowers, Kim Shipp, Jeff Vielhaber.

Q. Had Rob Ebinger also done that?

A. Yes.

* * *

TRANSCRIPT VOL. 3, FEB. 21, 2013
[EXCERPTS]

[p. 171-72]

* * *

A. He had asked me about what things I would be working on, and I detailed a list of them.

Q. That is -- What is on the screen right now is that list of things you were going to be working on?

A. Yes, sir.

Q. And did he respond to that list?

A. Yes, sir.

Q. And what was his response?

A. "Thanks. Now the question is, how are we going to get into email after you leave?"

Q. Now, do you know what he is referring to about "getting into email after you leave"?

A. Yes, sir.

Q. What is Musacchio referring to at this point?

A. How we would access the email accounts that I had been accessing while I was there.

Q. And is this right before you leave Exel?

A. Yes, sir.

Q. Was it your understanding that he was referring to his own email?

A. No. He was referring to any email account at Exel.

Q. Now, at this point in time, how long had Musacchio been gone from Exel?

A. Over a year.

Q. And what did you, if anything, what did you respond with?

A. "Not a problem. I have the back-door password that only I know and no one else can change."

Q. Now, when you refer to back door, what are you referring to?

A. There was an administrative account that existed that I had the username and passwords for.

Q. And what would you be able to do with the administrative accounts?

A. You could access anything you wanted to on the Exel server.

Q. And is that what you are referring to in this response?

A. Yes, sir.

Q. And what, if anything, did Mr. Musacchio respond with?

A. "Beauty!"

Q. And did you respond to that?

A. "I started around 5 a.m. My hope is to have it completed and in Dell's hands by 9 a.m."

Q. What is that a reference to, because it doesn't seem to be a response to the last comment?

A. It isn't. I may have read a different email and responded from this one.

Q. Okay. Now, this exchange from when you first started from this point where I am drawing the line, the part where you detail out a bunch of things that you are planning on doing to the point up here with the response "Beauty," how

* * *

[p. 215-17]

* * *

of the email exchanges between you and Mike Musacchio on November 24th and 25th of 2005?

A. Yes, sir.

MR. GREEN: The Government moves for the admission of No. 83.

MR. ETHINGTON: Judge, this is not a conditional exhibit, is it? This is --

THE COURT: Correct. It is not.

MR. ETHINGTON: No objection.

THE COURT: Admitted.

MR. GREEN: May we display No. 83, please?

Q. (BY MR. GREEN) If you look at the first part, the first part of the email which is down the bottom under the green line that I marked -- Do you see that area?

A. Yes, sir.

Q. And is that an email from Musacchio to you?

A. Yes, sir.

Q. What is he saying in that email?

A. "When you get a chance, try to get onto ETS's web mail." Which would be Exel. "Everything was fine last night, but tonight I get an error message that says failed to connect to mail server. I didn't do anything that would lock me out. Maybe the server is down."

Q. Now, is this the first time that you knew that Mike Musacchio was also going into ETS's web mail?

A. No, sir.

Q. And how do you know he was doing it before this time?

A. Because I gave him access to it after I had left Exel.

Q. Did you explain to him how to accomplish getting in?

A. Yes, sir.

Q. And was it -- How long after you left Exel did you have that conversation and provide that access to Musacchio?

A. Almost immediately.

Q. Now, as we continue up this thread, what is your response?

A. "Looks like the server is down. Guess we will have to wait until someone figures that out."

Q. And what did Musacchio say?

A. "Okay. Thanks."

Q. And did you respond to that?

A. Yes.

Q. And what was your response?

A. "It's working now. I restarted it remotely. I guess they have not changed a single password."

Q. And was there a response from Musacchio to that?

A. Yes, sir.

Q. And what was that?

A. "Incredible isn't it?"

Q. And what was your response to that, if anything?

A. "More like ignorant."

Q. Now, when you told Musacchio that "I restarted it remotely," did you restart Exel's server remotely?

A. No, sir.

Q. And do you know how that their server started up; how it got restarted?

A. No, sir.

Q. Why did you tell him that?

A. I was trying to impress him that I still had the ability to keep that up.

Q. Was that important in your relationship that you would want Musacchio to consider you valuable?

A. Absolutely. This became the only thing he ever wanted. It was a daily request. Every single day, "Go look, go look. I need this. I need that."

Q. And were you accommodating him on these requests?

A. Sure I was.

MR. GREEN: May approach, Your Honor?

THE COURT: Yes.

MR. GREEN: Thank you.

Q. (BY MR. GREEN) Sir, I have placed in front of you what has been marked as Government's No. 82. Does this appear to be an email between you and Mike Musacchio on December 27th, 2005?

A. Yes, sir.

Q. And does it appear to be an accurate copy of that email?

* * *

TRANSCRIPT VOL. 7, FEB. 27, 2013
[EXCERPTS]

[page 209, line 16 to page 211, line 18]

* * *

THE COURT: Yes.

All right. Next one?

MS. GROVES: No problem, Judge, with caution on punishment or notes, on or about, or consideration of only the crimes charged, or similar acts. And under general definitions, no problem with that.

With respect to the conspiracy instruction, no problem with that except, Judge, there is a reference to the elements of unauthorized access to a protected computer in the conspiracy charge, and then when you look at the unauthorized access instructions, I think it might be somewhat confusing if they are referring to it and it has specific dates in it. And I just have a suggestion that the reference be "on or about the date charged in the indictment" instead of a specific date in the instruction.

MR. ETHINGTON: What page?

THE COURT: Good point. Page 13.

MS. GROVES: And the same again on page 15.

MR. ETHINGTON: Can you do that again, Linda?

MS. GROVES: In looking at the conspiracy count, if you look at the first element it says -- it references the elements of the crime of making unauthorized access to a protected computer as defined in Counts 2 and 3 on pages 13 and 15. And then you can go to page 13, the first element gives a specific date, and

we are thinking that might be confusing for the conspiracy charge. It would be my preference to have it say "on or about the date charged in the indictment" for Count the and Count 3.

MR. ETHINGTON: So change "November 25th" to just --

MS. GROVES: "On or about the date charged in the indictment."

MR. ETHINGTON: Let's do that.

THE COURT: All right with that?

MR. ETHINGTON: Yes.

MS. GROVES: And that would be the same on page 15.

(Discussion amongst Government counsel out of the hearing of the reporter.)

MS. GROVES: Perhaps it is just better to restate the elements.

MS. HEATH: In Count 1?

MR. GREEN: Yes.

MS. HEATH: I agree.

THE COURT: Yes, that is a problem.

MS. GROVES: I think, Judge, we did that in our requested instruction No. 14. We simply restated the elements from the unauthorized access to protected computer.

THE COURT: Yeah. I was trying to avoid that, but we may not have any choice because of the difference. We will give that some thought and we will make the changes and we will let you all know in the morning how we change that.

Any thoughts, Mr. Ethington, on that?

MR. ETHINGTON: No, I agree. Let's take the confusion out of it.

* * *

TRANSCRIPT VOL. 8, FEB. 28 & MAR. 1, 2013 [EXCERPTS]

[page 52 ,line 23 to page 53, line 6]

* * *

(Whereupon, the jury left the courtroom.)

THE COURT: Other than adding Mr. Kelly to the co-Defendant instruction on page 5 and then the issue on the jury verdict, anything else that is outstanding regarding the charge that we need to address during the break?

MS. GROVES: I don't believe so, Your Honor.

MR. ETHINGTON: No, Your Honor.

THE COURT: We will make those changes and get them back to you here shortly.

* * *

[page 54, line 20 to page 55, line 24]

* * *

(Whereupon, the jury entered the courtroom.)

THE COURT: All right. Members of the jury, I will now read the Court's charge to the jury You don't have to worry about taking notes or remembering everything. We will send a copy of it back with you. You will each have your own copy to work with during your deliberations. We will also get the exhibits back there to you so you can use all of that during your deliberations.

(Whereupon, the Court's charge to the jury was read in open court.)

THE COURT: At this time the lawyers are permitted to address you in closing argument.

On behalf of the Government, Ms. Groves?

MS. GROVES: Thank you, Your Honor. May it please the Court, counsel.

Ladies and gentlemen, it is a privilege to address you at this point in time. On behalf of the Government's team, we appreciate very much the personal sacrifices that people sometimes have to make to fulfill their civic duty and sit on jury, but without you our system of justice just wouldn't work, and we thank you very much.

As you have sat here for almost two weeks now, you have heard some interesting stories, I hope, but let me just first off say what this case is not about. It is not about a good company versus a bad company. It is not about one method of doing business versus another method of doing business. This case is about Michael Musacchio being involved in a conspiracy to make unauthorized access to protected computers. It is also about him doing it himself on two substantive counts that are set out in the indictment.

* * *

[page 58, line 5 to page 59, line 10]

* * *

Once it looked like TTS was up and going, and I believe they had a bank account set up--there are some bank records in evidence that you can look at--that is really probably when they actually started the company started. Maybe they weren't moving freight at that time, but they were a company and they were

in business. And once that was up and running, Mr. Musacchio in September of 2005 left ETS and really started his company.

Now, you have heard a lot about non-compete agreements and non-solicitation agreements. Okay. That is really not about the hacking. That is more about the maneuvering that took place with Exel employees so they could prevent ETS from knowing that Musacchio was going to start up this company and do a brain-drain on their company by employees such as Jeff Vielhaber, Rob Ebinger, Roy Brown, Kim Shipp. All of those people were going to be shifted over to TTS to work with Musacchio and taken away from ETS. And this was going to happen in October, November, and early January of 2006. We have charts in evidence which will show you when people actually left ETS to join TTS.

You did hear from Jim Damman. After Mr. Musacchio left ETS, Jim Damman became the president of ETS. He realized when he came to ETS that there were problems with technology, and they were doing what they could to remedy those. He also realized that they needed to work hard to retain agents. What he didn't realize is that he was going to be practically cyber-stalked by Mr. Musacchio and Roy Brown. He didn't realize that some of the employees at ETS were not loyal to ETS and were going to provide confidential ETS documents to TTS through Mr. Musacchio and Mr. Brown to help that get its quick start-up.

* * *

[page 61, lines 2-23]

* * *

Mr. Merrill and Mr. Damman both spoke to you about what is -- what types of documents were taken by ETS employees by exceeding the authorized access, and whether those documents were documents which would provide a commercial advantage to a competitor. And a number of them were. Some of them you are going to hear about are the 2005 budget plan. And I know Mr. Musacchio and Ms. Shipp said, "That is nothing. That wouldn't benefit anybody." But when you get back in that jury room, take a look at it, because that 2005 budget plan provides information about at-risk agents, who all the agents are, what their annual revenues are. It is the type of information that may not be helpful to Mr. List, because he is the Harvard MBA and he is looking at something different, but it would be very helpful, in the opinion of Mr. Damman and Mr. Merrill and others, if it fell into the hands of a competitor, somebody who is trying to lure away the agents to their company that ETS had that were identified in that document.

There is peer analysis that fell into the hands or was taken -- Actually it was stolen. Let's call it what it is. It was stolen by Brown and Musacchio to help them set up TTS and get it a quick start.

* * *

[page 63, line 20 to page 67, line 3]

* * *

Another witness you heard from was Steve Bowers. Mr. Bowers was a senior vice president at ETS.

He had high hopes of joining Mr. Musacchio at TTS. And he did provide that 2005 budget plan for Exel at Mr. Musacchio's request. He also was an unindicted coconspirator who is not charged by the Government. And Mr. Bowers exceeded his authorized access in providing that to Mr. Musacchio.

Now, when we talk about exceeding authorized access, I need to interject at this point some testimony you heard from the HR person Melissa McDonald. From about 1997 through the time that Mr. Musacchio left ETS, there was an employee handbook which made it very clear that employees aren't supposed to give out confidential information of the business. This is not that unusual. When you go back to the jury room, you are going to be able to take your common sense and rational thought with you. That is not crazy.

In about 2003 there was a code of ethics that was also implemented. And it also said you cannot give out confidential business information of this company. We have to protect it. Employees can't do that.

Now think about this, ladies and gentlemen. While Mr. Musacchio was at ETS, he was the president and CEO, and all the employees of ETS are supposed to abide by the code of ethics, the code of business ethics, but to him, no big deal.

As part of Government's Exhibit No. 11-R, you will see some actual acknowledgment pages and signature pages from employees at ETS such as Roy Brown, Kim Shipp, Jeff Vielhaber, Rob Ebinger, Steve Bowers. They acknowledged that they read it, they understood it, and they would abide by it.

And in addition, all of these codes of conduct and ethics very available by ETS employees on the website. If they had any questions, Ms. McDonald said they could come to HR people or the legal counsel at ETS and they would straighten them out. "Can I disclose this?"

"Well, I don't know. Let's go ask somebody."

So there were resources there for employees such as Mr. Vielhaber, Bowers, and others, to determine if what they were doing was inappropriate.

But they already knew that, didn't they? Because they already knew that Musacchio was going to make a start-up company, and they already knew they wanted to be part of it. So what they were doing was ignoring the responsibility that they had to their company and being disloyal to their company, and providing Musacchio the documents he needed for that quick start-up of TTS.

And you also heard from Mr. Brown. Mr. Brown was over the I.T. department at ETS. He considered Mr. Musacchio a good friend and a mentor, and he really wanted to go with Musacchio to TTS. He started making unauthorized accesses pretty early on. He would use the IXDOM administrative password to access Exel servers. He would use his personal email account to -- Well, he would copy and paste something from the Exel mailbox that he had accessed quite frequently, Jim Damman's, paste it into his personal email account, and send it to Mr. Musacchio frequently at his personal email account. You have also got evidence in the case of those accounts. Roy Brown's was bellsouth.net. Mr. Musacchio's was

Comcast, and later in early January 2006 it became Verizon.

Mr. Brown has pled guilty. He hopes to get a benefit from his testimony in this case, which only comes to him if he testifies truthfully. But early in this case he came forward and wanted to cooperate and tell his story, and he has done that. He has told you that Musacchio was his boss, his mentor, his friend. He wanted to be involved in the TTS company, and he wanted to ingratiate himself to Musacchio by providing all of this information so that he could go to TTS because he wanted that equity interest and he didn't like how he was being treated at ETS.

And he and Musacchio -- Musacchio would request things from Mr. Brown and Mr. Brown would provide them. Musacchio had little key phrases like "go fishing; go hunting." Now, later Mr. Musacchio testified, "Well, that just meant I wanted him to keep his ear to the ground." Roy Brown told you that meant, "Get in those emails. Start looking in Damman, Hadland, Thompson's accounts, Brad Young. Get me information that will help me attract agents, prevent them from retaining agents." Especially information about agents is what he wanted, because "We have got to get TTS up and running, get it strong, and we have got to take these people away from ETS in order to do it."

Now, he is not getting confidential business information from any source other than ETS. ETS was targeted. He knew ETS, and I think you will agree he was not very fond of the management at ETS, some of the people he left behind.

* * *

[page 68, lines 5-13]

* * *

It goes to show that Mr. Musacchio, though, wanted information of all types from ETS. He used different sources of information. It was the employees who were making unauthorized access, it was Roy Brown and himself who were -- Well, the employees were exceeding authorized access, it was himself and Roy Brown who were making unauthorized access, it was employees like Kim Shipp who would listen in to the president's conversations and send an email.

* * *

[page 69, lines 5-14]

* * *

All right. On No. 13, this is an email. Going down to the bottom, we read these from the bottom up, that Jeffrey Vielhaber, who was a vice president at ETS, sent to Mike Musacchio. You may recall that Mr. Vielhaber, according to Musacchio's testimony, was someone -- an employee of ETS that he approached about getting information about technology, and in the course of that meeting Mr. Vielhaber, who also wanted to join TTS, asked if he could be hired on the side to go to check out software called LoadTech. And he had to sign a non-disclosure agreement.

* * *

[page 71, line 1 to page 74, line 6]

* * *

Can we go to No. 17, please?

Looking at the bottom, Roy Brown, look at the date of this. August 23rd, 2005. Roy Brown is still at ETS. He didn't leave until October. So he is still there and he is looking in email accounts and sending information to Musacchio. "I have not updated in a couple of months, but this should help," he says.

Musacchio responds, "Thanks. This will be helpful."

Can you go up, please?

Further up in the email string Musacchio asks Brown, "Can you get some Jim Damman emails?"

And Brown replies, "Yes, possibly, no guarantee. Anything you're looking for specifically?"

Can you look at No. 19, please? Can you go up to the next -- Can we enlarge just the first portion there? Thank you.

The information he had sent was of the agency locations, it was fairly current, August of 2005 information, detailing who their agents were, what their revenues were, if they owed money, their sales, all kinds of things on this, and it was described by Mr. Damman as something that would have commercial advantage to a competitor.

Now could we go to No. 22?

Remember there was a lot of testimony about a possible buyout of ETS by Deutsche Post? Mr. Damman had sent out an email to the members of ETS because it was going to be breaking news and he

was kind of letting them know what was going on. Down at the bottom you see his original email. "Some of you may have already read or heard about the announcement below."

Can we go up further?

Roy Brown sends that to Musacchio. Musacchio responds "This could not be better news." And they are pretty excited about it.

Can we go to the next one, please, No. 25?

At no time in these emails does Musacchio say, "Hey, we shouldn't be doing this. I don't want you sending me anymore emails." It is always, "Great. Get me more. Get me more."

Government's No. 25. This is an email taken, lifted, stolen from one of Jim Damman's emails. The Dan reference there is Dan Avramovich. You will see Jim Damman's original email among the exhibits when you go back. What Roy Brown did was to access that email account, take that information, and send it to Musacchio.

Can you go up a bit, please?

Well, they are pretty proud of themselves.

Can you go up a little bit more?

Let's go on now to No. 29. Government's No. 29 is pretty significant. There was an attachment that Brown sent on to Musacchio. You will see that phantom stock option program was a Damman document, and it will be also in the evidence that you will receive to consider. A phantom stock option program, Mr. Damman explained, was one of their attempts at retaining their agents by giving them--and I am no financier--but it is phantom stock, which is not actual

stock in the company, but it is a financial benefit to them if they were stockholders in the company.

When he sends it to Musacchio, Musacchio says, "You are on fire. Take a look at toad's email and see if he is sucking up to Jim." He is having fun with this, ladies and gentlemen.

Let's go on to No. 33.

And this is a very telling email, I think. Government's No. 33 an offer from Dan to Ken Ledbetter, and supposedly five to six other locations. This is information that Roy Brown got out of the email accounts. He sent it to Mike Musacchio. Mike says, "Well done. You're a master!"

And Brown responds, "I don't know about being a master, but it is apparent that I am becoming an excellent spy!"

And Musacchio calls him 007.

So when Mr. Musacchio said he thought it was okay for Roy Brown to access those email accounts, I want you to remember this. They both knew they had no business in there. Roy Brown is spying and Musacchio knows it. Roy Brown is making unauthorized access and Musacchio knows it, and he is loving it. He is loving the information that he is getting.

Let's go to No. 39.

No. 39. Again, this is part of an email string involving the phantom stock program. Let's start down at the bottom. This is No. 39. Obviously some information from Damman's email account has been -- His account has been hacked in and Roy Brown has copied it and he sent it on to Mike Musacchio.

* * *

[page 119, line 5 to page 120, line 9]

* * *

MS. HEATH: May it please the Court, counsel.

Ladies and gentlemen of the jury, you will be happy to know I am the last attorney you have to listen to before you start your deliberations. I am honored to represent the Government and I am honored to be here to give you the final closing argument.

Michael Musacchio is guilty of conspiring with Roy Brown and Mike Kelly to access without authorization the computer systems of Exel, the email systems; specifically the email boxes, as you have heard, of Damman, Merrill, Thompson, Hadland, Young.

He is guilty of personally accessing without authorization those very same computer systems, those same email boxes, personally. That is Counts 2 and 3.

Count 2, if you look at Exhibit No. 83, 81, 82, those three exhibits show Count 2. It shows Mike Musacchio's conversation with Roy Brown where he has the information and he is sending it to Roy Brown; information that could only come from the email boxes at Exel.

Government's Exhibit No. 107 is Count 3. Again, Mike Musacchio sending information to Roy Brown; information he could only get from accessing the mailboxes at Exel.

Count 1 is a conspiracy. He simply has to agree to engage in conduct--that is, accessing without authorization a computer system at Exel. That agreement you can determine through the conversations, through the emails that you have seen, from the tes-

timony of Brown, through the testimony of Kelly, that they did this for their boss, their current boss, their future boss, and then their current boss again—Mike Musacchio.

* * *

JURY CHARGE AND COMPLETED VERDICT FORM, MAR. 1, 2013

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES	§	
OF AMERICA,	§	
vs.	§	
	§	No.3:10-CR-308-P
MICHAEL MUSACCHIO (1)	§	
	§	

COURT'S CHARGE TO THE JURY

MEMBERS OF THE JURY:

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the Jury. It is my duty to preside over the trial and to decide what evidence is proper for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

First, I will give you some general instructions which apply in every case, for example, instructions about burden of proof and how to judge the believability of witnesses. Then, I will give you some specific

rules of law about this particular case; and finally, I will explain to you the procedures you should follow in your deliberations.

DUTY TO FOLLOW INSTRUCTIONS

You, as jurors, are the judges of the facts. But in determining what actually happened - that is, in reaching your decision as to the facts - it is your sworn duty to follow all the rules of law as I explain them to you.

You have no right to disregard or give special attention to anyone instruction or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences.

It is your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors and they have the right to expect nothing less.

PRESUMPTION OF INNOCENCE - BURDEN OF PROOF- REASONABLE DOUBT

The indictment is simply the description of the charge made by the Government against the defendant; it is not evidence of his guilt. The law presumes the defendant innocent. The presumption of innocence means that the defendant starts the trial with a clean slate. In other words, I instruct you that the defendant is presumed by you to be innocent throughout your deliberations until such time, if ever, you as a jury are satisfied that the government has

proven him guilty beyond a reasonable doubt. Unless you are satisfied beyond a reasonable doubt that the defendant is guilty, the presumption alone is sufficient to find the defendant not guilty.

A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the accused has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

EVIDENCE - EXCLUDING ARGUMENT OF COUNSEL AND COMMENT OF COURT

As I told you earlier, it is your duty to determine the facts. In doing so, you must consider only the evidence presented during the trial, including the sworn testimony of the witnesses, the exhibits and stipulated facts. Remember that any statements, objections or arguments made by the lawyers are not evidence. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case and, in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

During the trial I sustained objections to certain questions. You must disregard those questions. Do not speculate as to what the witness would have said

if permitted to answer the question or as to the contents of an exhibit. Your verdict must be based solely on the legally admissible evidence and testimony.

Also, do not assume from anything I have done or said during the trial that I have any opinion concerning any of the issues in the case. Except for the instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

EVIDENCE - INFERENCES - DIRECT AND CIRCUMSTANTIAL

While you should consider only the evidence, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the evidence.

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make; and, you should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating that the defendant is either guilty or not guilty. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

CREDIBILITY OF WITNESSES

I remind you that it is your job to decide whether the government has proved the guilt of the defendant beyond a reasonable doubt. In doing so, you must consider all the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses who testified in this case. You should decide whether you believe what each person had to say and how important that testimony was. In making that decision I suggest that you ask yourself a few questions. Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the government or the defense? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said.

The testimony of the defendant should be weighed and his credibility evaluated in the same way as that of any other witness.

In making up your mind and reaching a verdict, do not make any decisions simply because there were

more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because there were more witnesses testifying for one side on that point. Your job is to think about the testimony of each witness you have heard and decide how much you believe of what each witness had to say.

ACCOMPLICE - CO-DEFENDANT - PLEA AGREEMENT

In this case the government called Roy Brown and Mike Kelly, co-defendants, as witnesses with whom the government has entered into agreements providing that these codefendants will not be prosecuted for any charges beyond the crime alleged in count one of the indictment and a lesser sentence than they would otherwise face. Such plea bargaining, as it is called, has been approved as lawful and proper, and is expressly provided for in the rules of this court.

A co-defendant, including one who has entered into a plea agreement with the government or who received immunity from prosecution, is not prohibited from testifying. On the contrary, the testimony of such a witness may alone be of sufficient weight to sustain a verdict of guilty. You, the jury, must decide whether the witnesses' testimony has been affected by any of those circumstances, or by the witnesses' interest in the outcome of the case, or by prejudice against the defendant, or by the benefits that the witness has received as a result of being immunized from prosecution. You should keep in mind that such testimony is always to be received with caution and weighed with great care. You should never convict a defendant upon the unsupported testimony of a co-defendant unless you believe that testimony beyond a

reasonable doubt. The fact that a co-defendant has entered a plea of guilty to the offense charged is not evidence of the guilt of any other person.

ALLEGED CO-CONSPIRATORS

The government has also called Doug List and Steve Bowers as witnesses. The testimony of an alleged accomplice must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses. You, the jury, must decide whether the witnesses' testimony has been affected by any of those circumstances, or by the witnesses' interest in the outcome of the case, or by prejudice against the defendant, or by the benefits, if any, that the witnesses have received.

You should keep in mind that such testimony is always to be received with caution and weighed with great care. You should never convict any defendant upon the unsupported testimony of such witnesses unless you believe that testimony beyond a reasonable doubt.

For this reason, you should exercise caution in evaluating their testimony and scrutinize it with great care. You should consider whether they have an interest in the case and whether they have a motive to testify falsely. In other words, ask yourselves whether they have a stake in the outcome of this trial. You may decide not to accept their testimony, or their testimony may be accepted by you. If you believe some or all of such testimony to be true, it is up to you, the jury, to decide what weight to give to the testimony of an alleged accomplice.

CHARACTER EVIDENCE

Where a defendant has offered evidence of good general reputation for truth and veracity, or honesty and integrity, or as a law-abiding citizen, you may consider such evidence along with all the other evidence in the case.

Evidence of a defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since you may think it improbable that a person of good character in respect to those traits would commit such a crime.

Bear in mind, however, that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

MULTIPLE COUNTS

A separate crime is charged against the defendant in each count of the indictment. Each count, and the evidence pertaining to it, should be considered separately. The fact that you may find the accused guilty or not guilty of any of the crimes charged should not control your verdict as to any other crime.

GUILT BY ASSOCIATION

There is a long-standing rule against "guilt by association." A defendant may not be convicted merely because people who worked for him committed criminal conduct. In this case, Mr. Musacchio cannot be convicted simply because he was associated with or friendly with anyone you may find to have acted in violation of the law. Each element of each offense

must be proved independently on the basis of Mr. Musacchio's conduct and state of mind.

SUMMARIES AND CHARTS RECEIVED IN EVIDENCE

Certain charts and summaries have been received into evidence. Charts and summaries are valid only to the extent that they accurately reflect the underlying supporting evidence. You should give them only such weight as you think they deserve.

CAUTION - PUNISHMENT

If the defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not enter your consideration or discussion.

NOTES

Your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you did not take notes, you should rely upon your own independent recollection of the proceedings and you should not be unduly influenced by the notes of other jurors. You should not share your notes with any other Juror.

Notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been. Whether you took notes or not, each of you must form and express your own opinion as to the facts of the case.

You will note that we do have an official court reporter making a record of the trial; however, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

ON OR ABOUT

You will note that the indictment charges that the offenses were committed on or about specific dates. The government does not have to prove that the crimes were committed on those exact dates, so long as the government proves beyond a reasonable doubt that the defendant committed the crime on a date reasonably near the dates stated in the indictment.

CAUTION - CONSIDER ONLY THE CRIMES CHARGED

You are asked to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of each crime charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment. Neither are you concerned with the guilt of any other person or persons not on trial as a defendant in this case, except as you are otherwise instructed.

SIMILAR ACTS

You have heard evidence of acts of the defendant which may be similar to those charged in the indictment, but which were committed on other occasions. You must not consider any of this evidence in deciding if the defendant committed the acts charged in the indictment. However, you may consider this evidence for other, very limited, purposes.

If you find beyond a reasonable doubt from other evidence in this case that the defendant did commit the acts charged in the indictment, then you may consider evidence of the similar acts allegedly committed on other occasions to determine:

Whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment; or

Whether the defendant had a motive or the opportunity to commit the acts charged in the indictment; or

whether the defendant acted according to a plan or in preparation for commission of a crime; or

whether the defendant committed the acts for which he is on trial by accident or mistake.

These are the limited purposes for which any evidence of other similar acts may be considered.

GENERAL DEFINITIONS

The word "knowingly" as that term has been used from time to time in these instructions. means that the act was done voluntarily and intentionally and not because of mistake or accident.

The word "intentionally", as that term is used from time to time in these instructions means to act purposely, with the conscious desire to cause the result of the conduct.

The term "interstate commerce" means commerce or travel between one state, territory or possession of the United States and another state, territory or possession of the United States, including the District of Columbia.

COUNT 1-18 U.S.C. § 371

***Conspiracy to Make Unauthorized Access to Protected Computer* (conspiracy to violate 18 U.S.C. §§ 1030(a)(2)(C); (c)(2)(B)(i) and (iii)(unauthorized access)**

Count 1 of the indictment charges the defendant with conspiring to violate Title 18 U.S.C. § 1030(a)(2)(C), unauthorized access to protected computer(s), in violation of 18 U.S.C. § 371. Title 18 U.S.C., § 371, makes it a crime for anyone to conspire with someone else to commit an offense against the laws of the United States. Title 18 U.S.C. § 1030(a)(2)(C) makes it a crime for a person to intentionally access a protected computer without authorization and exceed authorized access, and thereby obtain information, and (1) the offense was committed for purposes of commercial advantages or (2) private financial gain, or (3) the value of the information exceeded $5,000.

A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of "partnership in crime" in which each member becomes the agent of every other member.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant and at least one other person made an agreement to commit the crime of unauthorized access to a protected computer in violation of 18 U.S.C. § 1030(a)(2)(C) as defined above.

Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose; and

Third: That one of the conspirators during the existence of the conspiracy **knowingly** committed at least one of the overt acts described in the indictment, in order to accomplish some object or purpose of the conspiracy.

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all of the details of the scheme alleged in the indictment were actually agreed upon or carried out. Nor must it prove that all of the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which

advances some purpose of a conspiracy, does not thereby become a conspirator.

COUNT 2 – VIOLATION OF 18 U.S.C. §§ 1030(a)(2)(C)

Unauthorized Access to Protected Computers

Count 2 of the indictment charges the defendant with making or attempting to make unauthorized access to Protected Computers in violation of 18 U.S.C. §§ 1030(a)(2)(C); (c)(2)(B)(i) and (iii). For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: On or about November 23-25, 2005 the defendant intentionally accessed, or attempted to access, a protected computer(s) without authorization; and

Second: The defendant obtained information from a protected computer(s); and

Third: The conduct involved an interstate or foreign communication; and

Fourth: At least one of the following is also proven beyond a reasonable doubt:

1. The offense was committed for purposes of commercial advantage;

or

2. The offense was committed for purposes of private financial gain; or

3. The value of the information obtained exceeded $5,000.

For you to find the defendant guilty of attempting to commit Unauthorized Access to Protected Comput-

er(s), you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant intended to commit Unauthorized Access to Protected Computer(s); and

Second: That the defendant did an act constituting a substantial step towards the commission of that crime which strongly corroborates the defendant's criminal intent

A computer means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.

A protected computer means a computer which is used in interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communications of the United States.

A commercial advantage includes not only monetary gain, but also an advantage over a competitor.

A financial gain includes the receipt or expected receipt of anything of value.

To find that a defendant acted for purposes of commercial advantage or private financial gain, you need not find that the defendant actually achieved

that aim, but only that the defendant acted for those purposes.

COUNT 3 – VIOLATION OF 18 U.S.C. §§ 1030(a)(2)(C)

Unauthorized Access to Protected Computers

Count 3 of the indictment charges the defendant with making or attempting to make unauthorized access to Protected Computers in violation of 18 U.S.C. §§ 1030(a)(2)(C); (c)(2)(B)(i) and (iii). For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: On or about January 21, 2006, the defendant intentionally accessed, or attempted to access, a protected computer(s) without authorization; and

Second: The defendant obtained information from a protected computer(s); and

Third: The conduct involved an interstate or foreign communication; and

Fourth: At least one of the following is also proven beyond a reasonable doubt:

1. The offense was committed for purposes of commercial advantage;

or

2. The offense was committed for purposes of private financial gain; or

3. The value of the information obtained exceeded $5,000.

For you to find the defendant guilty of attempting to commit Unauthorized Access to Protected Comput-

er(s), you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant intended to commit Unauthorized Access to Protected Computer(s); and

Second: That the defendant did an act constituting a substantial step towards the commission of that crime which strongly corroborates the defendant's criminal intent

The definitions of "protected computer," "commercial advantage," and "financial gain" for this count are the same as those definitions listed for Count 2.

To find that a defendant acted for purposes of commercial advantage or private financial gain, you need not find that the defendant actually achieved that aim, but only that the defendant acted for those purposes.

UNANIMITY OF THEORY

You will be instructed that your verdict, whether it is guilty or not guilty, must be unanimous. The following instruction applies to the unanimity requirement as to each count of the indictment.

The indictment alleges that the crimes of Unauthorized Access to Protected Computer(s) and Conspiracy to commit Unauthorized Access to Protected Computer(s) were committed in three different ways. When I instructed you on the elements of the crime of Unauthorized Access to Protected Computer(s), the Fourth element described three ways of committing that offense. The first is that the defendant committed the offense for purposes of commercial advantage.

The second is that the defendant committed the offense for purposes of private financial gain. The third is that the value of the information obtained exceeded $5,000.

The government does not have to prove that the offenses were committed in all of these ways for you to return a guilty verdict on these charges. Proof beyond a reasonable doubt on any one is enough. You could find that the government has proven more than one of them. But in order to return a guilty verdict, all twelve of you must agree that at least one has been proved. All of you must agree that the government proved beyond a reasonable doubt that the defendant committed the offense for purposes of commercial advantage; or, all of you must agree that the government proved beyond a reasonable doubt that the defendant committed the offense for purposes of private financial gain; or all of you must agree that the government proved beyond a reasonable doubt that value of the information obtained exceeded $5,000.

LESSER INCLUDED OFFENSE

In some cases a defendant is charged with breaking a law that actually covers two separate crimes. A "lesser included offense" is a crime that isn't as serious as the other crime a defendant is charged with.

If you find the Defendant not guilty of the crimes charged in Counts 1, 2, and 3, you must determine whether the Defendant is guilty of the lesser included offense.

Proof of the lesser included offense requires proof beyond a reasonable doubt of the facts necessary to prove the crime charged in Counts numbered 1,2, and 3 as explained on pages 12-15, except the offense was

not committed for purposes of commercial advantage or private financial gain, or the value of the information obtained did not exceed $5,000.

MISTAKE OF FACT

The Defendant has raised as a defense that his mistake that authorization existed to access the information, or that the accessing the information did not exceed authorization shows that he did not have the intent required to be guilty of the offense of Unauthorized Access to Protected Computers. It is the government's burden to prove beyond a reasonable doubt that the defendant had the intent required for the offense of Unauthorized Access to Protected Computers. If, after considering all the evidence in this case, you have a reasonable doubt about whether the defendant had the intent required for Unauthorized Access of Protected Computer(s), because of the defendant's mistake or for any other reason, you must find the defendant not guilty of that offense.

DUTY TO DELIBERATE - VERDICT FORM

To reach a verdict, whether it is guilty or not guilty, all of you must agree. Your verdict must be unanimous on each count of the indictment. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty to consult with one another and to deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if convinced that you were wrong. But do not give up your honest beliefs as to

the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are judges--judges of the facts. Your duty is to decide whether the government has proved the defendant guilty beyond a reasonable doubt.

When you go to the jury room, the first thing that you should do is select one of your number as your foreperson, who will help to guide your deliberations and will speak for you here in the courtroom.

A form of verdict has been prepared for your convenience.

The foreperson will write the unanimous answer of the jury in the space provided for each count of the indictment, either guilty or not guilty. At the conclusion of your deliberations, the foreperson should date and sign the verdict.

If you need to communicate with me during your deliberations, the foreperson should write the message and give it to the marshal. I will either reply in writing or bring you back into the court to answer your message.

Bear in mind that you are never to reveal to any person, not even to the court, how the jury stands, numerically or otherwise, on any count of the indictment, until after you have reached a unanimous verdict.

SIGNED this [28th] day of February, 2013.

s/JORGE A. SOLIS

s/JORGE A. SOLIS

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES	§	
OF AMERICA,	§	
vs.	§	CASE
	§	No.3:10-CR-308-P
MICHAEL MUSACCHIO (1)	§	
	§	

JURY VERDICT FORM

MEMBERS OF THE JURY:

COUNT 1:

We, the jury, find the Defendant Michael Musacchio:

(X) GUILTY of the offense charged or

( ) NOT GUILTY.

Consider the lesser included offense only if your verdict above is not guilty:

( ) GUILTY of the lesser included offense or

( ) NOT GUILTY

COUNT 2:

We, the jury, find the Defendant Michael Musacchio:

(X) GUILTY of the offense charged or

( ) NOT GUILTY.

Consider the lesser included offense only if your verdict above is not guilty:

( ) GUILTY of the lesser included offense or

( ) NOT GUILTY

COUNT 3:

We, the jury, find the Defendant Michael Musacchio:

(X) GUILTY of the offense charged or

( ) NOT GUILTY.

Consider the lesser included offense only if your verdict above is not guilty:

( ) GUILTY of the lesser included offense or

( ) NOT GUILTY

VERDICT CERTIFICATION

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

s/ [Illegible]	[March 1, 2013]
FOREPERSON	DATE

SENTENCING TRANSCRIPT PART 2, SEPT. 5, 2013 [EXCERPTS]

* * *

[page 115, line 4 to page 116, line 5]

MS. GROVES: And that is what is so difficult to determine in these cases. That is why there is really only one case charging anything similar to what we have in the Musacchio case, and that is the *Batti* case. And the *Batti* case there were only 21 days of unauthorized access involved in that. In this case we are talking about a two-year period. We are talking about two individuals making unauthorized access and a third individual providing the back-door administrative passwords. So this is a much larger case than *Batti* was.

THE COURT: Now, are you limiting your unauthorized access -- are you conflating that with also exceeding authorized access? When we went to trial we charged the jury only on unauthorized access, and that is a shorter period of time.

MS. GROVES: It is a shorter period of time. It has to take place, it has to start after Mr. Musacchio has left Exel.

THE COURT: Okay.

MS. GROVES: And the Court is absolutely correct on that point. It is very easy for me to conflate them, having dealt with this case for so long. One of the objects of the conspiracy, of course, was exceeding authorized access, but the Government did not submit it in that form to the jury.

THE COURT: Right. The jury only received the unauthorized access.

* * *